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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

LUIS FUENTES, PETITIONER

v.

WAGNER, WARDEN; KONEMANN, CORRECTIONAL OFFICER; KLEEMAN, CORRECTIONAL OFFICER; DONATO, CORRECTIONAL OFFICER; BROWN, SERGEANT; WERST, ASSISTANT WARDEN; AND BERKS COUNTY, PENNSYLVANIA, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a 42 U.S.C. § 1983 action brought by a pretrial detainee who alleges the use of excessive force by prison officials in violation of the detainee's Fourteenth Amendment substantive due process right to be free from punishment should be governed by the "objective reasonableness" standard applied to Fourth Amendment questions, or the "shocks the conscience" standard which has recently been applied in police pursuit cases.

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PETITION FOR A WRIT OF CERTIORARI

Luis Fuentes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-22a) is reported as *Fuentes v. Wagner*, 206 F.3d 335 (3d Cir. 2000). The opinion of the district court (App. 23a-41a) is unreported.

JURISDICTION

The court of appeals entered its judgment on March 10, 2000. Neither party sought a petition for rehearing. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION AND CONSTITUTIONAL AMENDMENT INVOLVED

1. Section 1983 of Title 42, U.S. Code, provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Petitioner's Section 1983 action involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. Section 1983 of Title 42, U.S. Code, provides a plaintiff with a cause of action in federal court against a defendant acting under color of state law, when the defendant causes a deprivation of rights guaranteed to the plaintiff by the Constitution.

2. In 1995, Luis Fuentes was imprisoned in the Behavioral Adjustment Unit of the Berks County Prison while awaiting sentencing on federal drug charges. App. 3a; *Fuentes v. Wagner*, 206 F.3d 335, 339 (3d Cir. 2000). On December 28, 1995, Mr. Fuentes yelled and kicked his cell door to get the correctional officers' attention because another inmate had urinated into Mr. Fuentes' cell. *Id.* When officers Konemann and Kleeman arrived, they instructed Mr. Fuentes to place his hands through the food slot so that the officers could place handcuffs on him. *Id.* He complied and was handcuffed. *Id.* The officers then entered the cell and began stripping it as punishment for kicking the cell door. *Id.* As they stripped the bed of sheets, Mr. Fuentes protested and grabbed at the sheets. *Id.* A struggle ensued. *Id.* According to the officers, Mr. Fuentes swung at them, and they wrestled him to the floor. *Id.* According to Mr. Fuentes, after he grabbed at the sheets, officers Konemann and Kleeman shoved him against the wall, threw him on the floor, and beat him as he lay on the floor in handcuffs. App. 26a; *Fuentes v. Wagner*, No. 96-3251, slip op. at 4 (E.D. Pa. May 28, 1998). When told about the incident, the assistant warden granted the officers permission to place Mr. Fuentes in a restraint chair for eight hours. App. 5a; *Fuentes*, 206 F.3d at 339.

3. Mr. Fuentes brought a § 1983 action in the Eastern District of Pennsylvania, alleging that the officers used excessive force against him in violation of the Fourteenth Amendment.[1] The parties

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1. Mr. Fuentes further alleged that the use of the restraint chair violated his substantive and procedural due process rights protected by the Fourteenth Amendment of the United States Constitution. The Magistrate Judge denied cross-motions for summary judgment on the procedural due process claim,

consented to proceed before a Magistrate Judge. Before trial, Mr. Fuentes submitted the following proposed instruction to the jury on his excessive force claim:

> In order to prove that the defendants used excessive and unnecessary force, the plaintiff must prove by a preponderance of the evidence (1) that the plaintiff suffered some harm, (2) that the harm resulted directly from the use of force that was clearly excessive in relation to any need for the use of force, and (3) that the excessiveness of the force was objectively unreasonable in light of the facts and circumstances of the case. Some of the factors you may consider in determining whether the defendants used excessive force are: (1) the extent of the injury suffered, (2) the need for the use of force, (3) the relationship between that need and the amount of force used, (4) the threat reasonably perceived by the prison guards involved; and (5) any efforts made to temper the severity of the forceful response.

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finding that, pursuant to *Bell v. Wolfish*, 441 U.S. 520 (1979), there was a genuine issue of material fact as to whether the prison officials used the restraint chair against Mr. Fuentes, a pretrial detainee, for punitive or security reasons. App. 35a. The Magistrate Judge granted summary judgment to the prison officials on the substantive due process claim related to the restraint chair, finding that under the Eighth Amendment, the use of the restraint chair was proper "under any of the tests currently being applied," even if the restraint chair was used for punitive purposes. App. 38a.

App. 17a n.15; *Fuentes*, 206 F.3d at 346 n.15. The court rejected this proposed "objective reasonableness" instruction in favor of the defendants' proposed instruction, and instructed the jury as follows on Mr. Fuentes' excessive force claim:

> [P]laintiff must show by a preponderance of the evidence, that one or more of the defendants inflicted unnecessary and wanton pain and suffering. You must decide whether the force applied was in a good faith effort to restore or maintain discipline, in which case, you must find that the defendants did not use excessive force, or whether the force applies [sic] was inspired by an unwise, excessive zeal, amounting to an abuse of official power, that shocks the conscience, in which case, you must find that one or more of the defendants did use excessive force.

App. 17a. Mr. Fuentes objected to this "shocks the conscience" instruction. The jury returned a verdict in favor of the defendants.

4. Mr. Fuentes appealed to the United States Court of Appeals for the Third Circuit (the "Third Circuit"), arguing among other things that the trial court erred when instructing the jury on the Fourteenth Amendment excessive force claim. The Third Circuit upheld the jury verdict, concluding that the excessive force instruction was proper. App. 22a. The court reasoned that Mr. Fuentes' proposed objective reasonableness test was inappropriate because that test had as its foundation the Fourth Amendment. *Id.* at App. 18a. The court concluded that a Fourth Amendment standard was appropriate only in claims arising from investigatory stops and/or arrests. *Id.* The court also rejected the argument that the jury could resolve the excessive force claim by relying on the "conditions of confinement" test outlined in *Bell v. Wolfish*, 441 U.S. 520 (1979). Rather, the court held, "the Eighth Amendment standards found in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d

251 (1986) and *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance," making it appropriate to consider whether the guards were motivated by a desire to inflict "wanton pain and suffering." App. 19a-20a; *Fuentes*, 206 F.3d at 347. Although the "shocks the conscience" test that the trial court actually used gave the Third Circuit pause in light of earlier Third Circuit opinions suggesting that such a standard is proper only in police pursuit cases, the appellate court nonetheless concluded that this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), established that it was appropriate to apply the "shocks the conscience" standard to a pretrial detainee's excessive force claim. App. 20a-21a; *Fuentes*, 206 F.3d at 348.

REASONS FOR GRANTING THE WRIT

I. Introduction

The United States Constitution provides a continuum of protection from excessive force. At the beginning of the criminal process, during the arrest, investigatory stop, or "seizure," the Fourth Amendment places a limit of objective reasonableness on the government's ability to use force. *Graham v. Connor*, 490 U.S. 386, 395 (1989). After sentencing, the Eighth Amendment's prohibition against cruel and unusual punishment provides the constitutional protection against excessive force. *Id.* at 395 n.10 (citing *Whitley v. Albers*, 475 U.S. 312, 327 (1986)). However, this Court has never decided what amount of protection the Constitution provides for an individual in custody after arrest and before sentencing.

Without guidance from this Court, federal courts across the country have struggled to determine the appropriate standard to apply when a pretrial detainee alleges that he or she was subjected to excessive force by a corrections officer. Indeed, on two occasions, this Court has explicitly declined to define the test applicable to pretrial detainee excessive force claims. In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court expressly excluded pretrial detainees from its holding that the Due Process Clause provides no greater protection to sentenced inmates than the Eighth Amendment. *Id.* at

327. Three years later, in *Graham v. Connor*, 490 U.S. 386 (1989), this Court again declined to define the precise constitutional test used to judge pretrial detainee excessive force claims, instead stating only that "[i]t is clear...that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Id.* at 395 n.10; *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). The issue then is what this protection means.

In the absence of guidance from this Court, lower federal courts deciding the appropriate constitutional test to apply to pretrial detainee claims of excessive force have adopted a wide variety of inconsistent approaches. Some courts, such as the Seventh, Eighth, and Ninth Circuits, have applied the Fourth Amendment "objective reasonableness" test to pretrial detainees. *See infra* Section II.A. The Fourth Circuit appears to apply the "shocks the conscience" standard first enunciated as a substantive due process test by this Court in *Rochin v. California*, 342 U.S. 165, 172-73 (1952). *See infra* Section II.B. The Second and Fifth Circuits apply an Eighth Amendment test, as developed by this Court in *Hudson v. McMillian*, 503 U.S. 1 (1992), and *Whitley v. Albers*, 475 U.S. 312 (1986). *See infra* Section II.C.

Because of the lack of constitutional guidance in this area of the law, it is difficult to state with accuracy which test most circuits apply. The Second Circuit, for example, has at times mixed a "shocks the conscience" standard with an Eighth Amendment test. *See Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973). The Ninth Circuit has cited the "shocks the conscience" language while at the same time applying an "objective reasonableness" test. Indeed, the Third Circuit opinion in this case is a perfect example of the confusion reigning in the circuits, for the Third Circuit seemingly adopted *both* a "shocks the conscience" test and an Eighth Amendment test. *See infra* Section III. With such profound confusion regarding the appropriate test, it is now time for this Court to address the issue it carefully reserved in *Whitley* and *Graham*.

A grant of certiorari is particularly crucial in this case because the appropriate standard for determining pretrial detainee

excessive force claims affects so many cases. Hundreds of decisions across the country since *Whitley* and *Graham* have attempted to resolve the question, and with each decision has come further confusion. Pretrial detainees are a substantial portion of the more than one-million incarcerated persons across the nation. Sentenced inmates, of course, have a clear constitutional right to be free from excessive force that amounts to cruel and unusual punishment in violation of the Eighth Amendment. But what of those who have not yet been sentenced? This Court has rejected the notion that the Constitution provides any less protection to this class of detainees. In fact, under *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), detainees are entitled to *more* constitutional protection than sentenced inmates -- they may not be subjected to punishment of any kind, cruel or otherwise. Yet without a clear and uniform test for federal courts to use in protecting these detainees' rights, the danger arises that a detainee will actually receive even <u>less</u> protection than a sentenced inmate. This logical inconsistency surely cannot be part of the fabric of our Constitution. Thus, it is crucial for this Court to close the loop it has previously left open, and to resolve the longstanding conflict over the proper test to protect the right of thousands of pretrial detainees across the nation to be free from excessive force.

II. Federal Courts of Appeal Are in Conflict Over the Appropriate Test to Apply to an Excessive Force Claim Brought by a Pretrial Detainee.

The Federal Courts of Appeal are currently in conflict and apply at least three distinct tests to judge pretrial detainee excessive force claims: the "objective reasonableness" test, the "shocks the conscience" test, and the "malicious and sadistic" test. The "objective reasonableness" standard is best suited to Fourteenth Amendment claims of excessive force because it addresses the key protection of the Fourteenth Amendment -- protection from punishment. In other words, what is punishment should be determined by objective criteria, consistently applied, rather than subjective criteria -- either based on the jury's subjective views ("shocks the conscience") or the defendant's state of mind ("malicious and sadistic").

A. The "Objective Reasonableness" Standard.

The Eighth, Seventh, and Ninth Circuits judge a pretrial detainee's excessive force claim by whether the correctional officers' conduct was "objectively reasonable."

The Eighth Circuit has endorsed the "objective reasonableness" standard in its Model Civil Jury Instructions Manual. *See Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit*, § 4.20 (1999) ("excessive force cases should be resolved by use of the same standard as applied to fourth amendment cases (reasonableness)."); *Freeman v. Jackson*, 107 F.3d 875, 1997 WL 61226 at *1 (8th Cir. 1997) (Table) (affirming the district court's conclusion that the defendants' use of force was reasonable and did not exceed the force necessary). Because the reasonableness test is designed to assess whether the force used against a detainee amounted to punishment, at least one court has recognized that the reasonableness inquiry should track the test for punishment established in *Bell v. Wolfish*, 441 U.S. 520 (1979). *See Smith v. Copeland*, 892 F. Supp. 1218, 1229 (E.D. Mo. 1995), *aff'd* 87 F.3d 265 (8th Cir. 1996) ("Under *Wolfish*'s standard then, the use of force by defendants. . .was 'punishment' in violation of plaintiffs' constitutional rights if it was not reasonably related to a legitimate governmental objective.").

The Eighth Circuit approach recognizes that, at bottom, the appropriate inquiry was mandated by this Court in *Bell v. Wolfish*. The fundamental question is whether the force used constitutes punishment. Thus, in practice, the Eighth Circuit ties its reasonableness inquiry to the legitimate governmental objective of maintaining jail security. The inquiry then becomes whether the force used was reasonable in light of the circumstances at the time, which tracks the reasonableness inquiry for law enforcement officers on the street.

The Seventh Circuit likewise ties its use of an "objective reasonableness" standard in detainee excessive force cases to the principles of the Fourth Amendment. In *Titran v. Ackman*, 893 F.2d 145 (7th Cir. 1990), for example, Judge Easterbrook rejected a "shocks the conscience" substantive due process test, instead using

Fourth Amendment principles to determine whether the force that was used constituted punishment:

> *Bell v. Wolfish* held, and *Graham* reiterated, that during pretrial detention the state may not "punish" the suspect. Did the state punish? -- and not more ambulatory inquiries into the consciences of jurors or the severity of the injury -- is the right question when a captive of the state claims that she has been attacked by her jailers. Most of the time the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them.

Id. at 147; *see also Wilson v. Williams*, 83 F.3d 870, 876 (7th Cir. 1996) (finding that the standard articulated in *Graham v. Connor* for excessive force claims raised under the Fourth Amendment -- whether the officer acted objectively reasonably -- was appropriate for analyzing a pretrial detainee's excessive force claim as well).

Of course, the Due Process Clause does not proscribe negligence, and thus the Seventh Circuit in *Wilson* recognized the need to examine the intent of the state actor. *Wilson*, 83 F.3d at 875 (quoting *Titran*, 893 F.2d at 147). This makes analytical sense, recognized the *Wilson* court, because punishment, which may not be applied to detainees pursuant to the protections of substantive due process, has as an inherent element a deliberate act, a retributive or deterrent motive. *Wilson*, 83 F.3d at 875. "The fact that the exploration of these issues in the Fourteenth Amendment context cannot be 'wholly objective' does not mean that the test must be 'wholly subjective,' either." *Id.* at 876. The *Wilson* court thus recognized a need to reconcile the subjective state of mind of the state actor with principles of objective reasonableness, which was accomplished by allowing the jury to infer intent through reliance on

objective factors. *Id.* The court did not, however, resort to a standard which incongruously inquires into the subjective state of mind of *jurors*.

Finally, the Ninth Circuit has also adopted an objective reasonableness test for pretrial detainee excessive force claims, at least until there has been a determination that the detainee "is legally in custody based upon probable cause for arrest." *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996). The Ninth Circuit approach may be more tangled after arraignment, however. Thus, in *White v. Roper*, 901 F.2d 1501 (9th Cir. 1990), a pretrial detainee alleged that a prison guard used excessive force while subduing him. *Id.* at 1506-07. In one paragraph, the court noted that prison beatings that shock the conscience are actionable, but then went on to hold that the court must analyze the reasonableness of the officer's actions in light of the circumstances. *Id.* at 1507. It thus appears that *White* adopts the use of an objective reasonableness test in practice, even as it pays homage to the "shocks the conscience" standard. This analytical confusion results from the absence of a clear decision on the issue from this Court.[2]

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2. The confusion stretches even to what constitutional amendments apply to a pretrial detainee's excessive force claim. For instance, both the Eleventh and First Circuits have expressed uncertainty about whether a pretrial detainee may raise a Fourth Amendment claim in conjunction with a substantive due process excessive force claim. *See Vineyard v. County of Murray*, 990 F.2d 1207, 1211 (11th Cir. 1993) (refusing to resolve the issue of whether the detainee's excessive force claim arose under the Fourth Amendment protection against seizures or the Fourteenth Amendment protection against punishment because in either case the beating was unconstitutional); *Bryer v. Creati*, 915 F.2d 1556, 1990 WL 151359 at *3 (1st Cir. 1990) (Table) (finding, without deciding the issue, that the objective reasonableness test may be appropriate in detainee excessive force claims). The inquiry in these circuits often revolves around whether the force can be deemed a "seizure," rather than whether it constitutes punishment. These circuits have not expressly rejected the notion that objective

In sum, because "*Bell v. Wolfish* did not instruct the inferior federal courts to inquire into the state of anyone's conscience," *Titran*, 893 F.2d at 147, the Seventh Circuit applies an objective reasonableness test derived from the Fourth Amendment. The Eighth and Ninth Circuits follow the same path, and all three circuits recognize that the fundamental question in detainee excessive force cases is whether the force used constituted punishment. These three circuits have properly decided to resolve that question by looking to objective standards, rather than to a subjective "shocks the conscience" standard that can vary from juror to juror.

B. The "Shocks the Conscience" Standard.

The "shocks the conscience" test finds its roots in *Rochin v. California*, 342 U.S. 165 (1952). In that case, this Court considered whether substantive due process placed a bar on the ability of the police to pump a suspect's stomach to recover narcotics. *Id.* at 166-67. After a discourse on the Due Process Clause, Justice Frankfurter concluded "that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience." *Id.* at 172. This passage is the only reference to "shocks the conscience" in the entire case, yet in the 50 years since *Rochin*, the case has been cited again and again as articulating the principle that plaintiffs can establish a

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reasonableness continues to apply after arraignment; rather, they all recognize that this Court has yet to rule on the issue, and they look to this Court for guidance. *See, e.g., Bryer*, 915 F.2d at 1556, 1990 WL 151359 at *3 (Table) (finding that this Court has not yet determined whether the objective reasonableness standard applies to pretrial detainees, but guessing that the objective reasonableness test "may be suitable").

due process violation *only* if the government's conduct "shocks the conscience."[3]

Since *Rochin*, several members of this Court have expressed apprehension about the viability of a "shocks the conscience" standard for evaluating substantive due process claims,[4] yet some circuits continue to use it in pretrial detainee excessive force cases.

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3. It should also be noted that *Rochin* itself, if decided today, would be decided by the Fourth Amendment principles of objectively unreasonable search and seizure. *See County of Sacramento v. Lewis*, 523 U.S. 833, 849 n.9 (1998).

4. The Third Circuit's opinion in this case relied on *County of Sacramento v. Lewis*, in which this Court applied the "shocks the conscience" standard to determine whether a police officer's conduct in a high speed pursuit leading to the death of a passenger violated substantive due process. In that case, the concurring opinion of Justices Scalia and Thomas took issue with the "shocks the conscience" test:

> [T]oday's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Celophane of subjectivity, th' ol' "shocks the conscience" test. According to today's opinion, this is the measure of arbitrariness when what is at issue is executive rather than legislative action. [*Washington v.*] *Glucksberg*, of course, rejected "shocks the conscience", just as it rejected the less subjective "arbitrary action" test.

523 U.S. at 861-62; *see also Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (refusing to apply either "shocks the conscience" or an "arbitrariness" test, choosing instead to ask whether the fundamental rights and liberties were *objectively* rooted in this nation's history and tradition).

The seminal case on pretrial detainee excessive force claims which applies the "shocks the conscience" test is *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973). *Johnson* involved an allegation that a corrections officer beat a pretrial detainee. *Id.* at 1029. The court, concluding that the case did not lie within the confines of the Eighth Amendment, instead looked to substantive due process and hesitantly latched on to the "shocks the conscience" language of *Rochin*. "While the *Rochin* test, 'conduct that shocks the conscience,' is not one that can be applied by a computer, it at least points the way." *Id.* at 1033. Because of the unique setting of a prison, where guards must remain free to enforce regulations, the court reasoned that intentional force may sometimes be appropriate. *Id.* In order to determine whether conduct was conscience shocking, the court suggested analysis into at least four factors: "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.*

The Fourth Circuit appears to have adopted the *Johnson* "shocks the conscience" test as well. *See, e.g., United States v. Cobb*, 905 F.2d 784, 789 (4th Cir. 1990) (endorsing use of the *Johnson* test in a case where a pretrial detainee alleged excessive force). In fact, in *Cobb*, the defendant police officers argued that the lower court committed error by neglecting to mention the words "shocks the conscience" in the jury instruction. *Id.* at 788. The court of appeals disagreed, noting that a jury instruction which used the four factors of the *Johnson* test was adequate even if it did not explicitly mention the words "shocks the conscience" or "punishment." *Id.* at 789. However, the court of appeals missed the most important part of the Fourteenth Amendment analysis because it found it unnecessary to instruct the jury regarding the ultimate question in pretrial detainee excessive force claims -- whether the officers' conduct constituted "punishment."

It is unclear, however, whether the "shocks the conscience" standard articulated in *Cobb* retains continuing vitality in the Fourth Circuit, or rather, whether detainee excessive force claims are now properly judged pursuant to Eighth Amendment principles. *See*

Taylor v. McDuffie, 155 F.3d 479, 483 (4th Cir. 1998) (finding that in accordance with *Whitley*, a pretrial detainee must show that defendants inflicted unnecessary and wanton pain); *Riley v. Dorton*, 115 F.3d 1159, 1166-67 (4th Cir. 1997) (noting that *de minimis* imposition of excessive force does not satisfy the *Hudson* standard in a case involving a pretrial detainee).

C. The "Malicious and Sadistic" Standard.

The Second and Fifth Circuits have chosen yet a third approach. The Second and Fifth Circuits have decided to focus upon the intent of the defendants -- i.e., whether acts were malicious and sadistic -- in deciding whether a pretrial detainee's right to be free from excessive force has been violated. Both of these circuits have explicitly rejected the "shocks the conscience" test. *See United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999) (stating, "we conclude that the *Hudson* analysis is applicable to excessive force claims brought under the Fourteenth Amendment as well," without mentioning "shocks the conscience" as the overarching test); *Rodriguez v. Phillips*, 66 F.3d 470, 477 (2d Cir. 1995) (finding that "the viability of *Johnson*'s substantive due process analysis of excessive force has in most cases not survived"); *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993) (applying the Eighth Amendment excessive force test to pretrial detainees); *see also Brothers v. Klevenhagen*, 28 F.3d 452, 457 (5th Cir. 1994) (applying *Valencia* in a case where a pretrial detainee was killed while trying to escape).

The uncertainty about the continuing viability of "shocks the conscience" has spread to the Sixth Circuit as well, with a corresponding effect of unsettling the law and leaving litigants with no idea as to how a court will evaluate a pretrial detainee excessive force claim. In a Sixth Circuit case, for example, the court struggled to establish the boundaries of detainee excessive force claims, stating that this Court has rejected the "shock the conscience" test for cases involving allegations of excessive force by police, but later in the same paragraph stating that "[a]fter *Graham*, the status of the 'shock the conscience' test in contexts other than allegations of excessive force is uncertain." *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990).

In sum, the need for guidance from this Court is evident. The circuits are using fundamentally different tests that focus on different elements (objective factors, the jurors' consciences, or the defendants' state of mind) to evaluate the same claims. These different tests surely lead to different outcomes. Therefore, it is time for this Court to clarify the law so that pretrial detainees' constitutional right to be free from excessive force is uniformly protected throughout the nation.

III. The Third Circuit Erred When It Adopted "Shocks the Conscience" as the Appropriate Standard, While at the Same Time Endorsing an Eighth Amendment Standard.

An examination of the Third Circuit Court of Appeals' opinion in this case highlights the errors made by that court in upholding "shocks the conscience" as the appropriate constitutional standard for pretrial detainee claims. First, the *Fuentes* court itself hesitated before applying the standard, stating that previous decisions in the circuit indicated that "shocks the conscience" may be applicable only in police pursuit cases. *Fuentes v. Wagner*, 206 F.3d 335, 348 (2000) (citing *Kneipp v. Tedder*, 95 F.3d 1199, 1207-08 (3d Cir. 1996) ("We believe the *Fagan II* shocks the conscience standard is limited to police pursuit cases.")). Second, the court cited with approval *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994), and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Those two cases involved high speed police pursuit, rather than excessive force used against a person in the government's custody, and in both cases, the "shocks the conscience" standard was strongly criticized by members of those Courts. *See Lewis*, 523 U.S. at 860-65 (SCALIA, J., concurring); *Fagan*, 22 F.3d at 1309-1328 (Cowen, J., dissenting). The *Fagan* decision, in fact, had a lengthy and vigorous dissent which charged that *Rochin*: (1) had eroded as important precedent; (2) had mistakenly been extended as a substantive test; and (3) is a vague and impractical standard. *Fagan*, 22 F.3d 1316-19 (Cowen, J., dissenting). Finally, as a result of the Third Circuit's apparent apprehension about whole-heartedly endorsing the "shocks the conscience" test, it approved of a hybrid standard which seems to require future courts within the Third Circuit to use both a "shocks the conscience" standard *and* an Eighth

Amendment standard to judge pretrial detainee excessive force claims. *Fuentes*, 206 F.3d at 349; App. 21a.

The *Fuentes* court, with virtually no analysis into the confused history of "shocks the conscience" versus "objective reasonableness" as the appropriate test for Due Process excessive force claims, announced a standard which requires jurors to find essentially two facts: that their consciences are "shocked" and that the guards acted maliciously and sadistically rather than in good faith. In contrast, Mr. Fuentes' proposed instruction required the jury to analyze the objective reasonableness of the officers' conduct in light of the circumstances, and further instructed jurors to consider the need for force, the proportionality between the need for force and the actual force used, the threat reasonably perceived by the guards, the efforts made to temper the severity of the response, and the amount of injury suffered. It is this proposed instruction, which is aligned with the Seventh, Eighth, and Ninth Circuits' reasonableness tests, while at the same time borrowing from *Johnson*'s factors, that would have allowed the jury to determine whether Mr. Fuentes was "punished" by the use of excessive force in violation of his constitutional rights.

At bottom, whether the detainee suffered punishment at all, rather than whether the punishment was severe enough to shock the conscience of the jury, is the appropriate question. Application of either a "shocks the conscience" test, or an Eighth Amendment test (or both), simply does not answer the question of whether detainees were punished in violation of their rights. The current trend of some circuits away from "shocks the conscience" reflects a well-grounded fear that the test is a wholly subjective, arbitrary standard that is impossible to apply fairly. *See, e.g., Braley, supra,* 906 F.2d at 225 (characterizing the "shocks the conscience" standard as "fuzzy under the best of circumstances"). More important, it is also an unduly high standard that "would rarely be met." *Telfair v. Gilberg*, 868 F. Supp. 1396, 1409 (S.D. Ga. 1994). Applying such a test presents insuperable analytical problems, because the Due Process Clause grants pretrial detainees *more* protection than sentenced inmates. *City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 244 (1983). As citizens who are detained pending trial or sentencing, it is illogical for them to be subjected to a more difficult standard than

the Eighth Amendment excessive force standard -- yet that is exactly the effect of a "shocks the conscience" test.

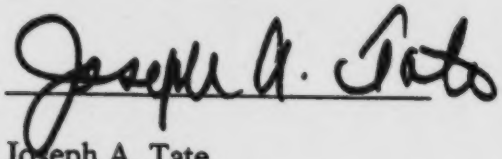
At the same time, however, moving to an Eighth Amendment test for pretrial detainees, as some courts have done, presents further analytical problems for the lower federal courts. The Third Circuit's decision to apply an Eighth Amendment standard concurrently with the "shocks the conscience" standard creates such a problem. In particular, detainees are entitled to protection from *all* punishment, not just "cruel or unusual" punishment. *Bell*, 441 U.S. at 535. A court may not apply an Eighth Amendment excessive force test without erasing the crucial constitutional distinction between cruel and unusual punishment, which may never be imposed on sentenced inmates, and punishment of any form, which may never be imposed on pretrial detainees.

The Third Circuit clearly erred by choosing "shocks the conscience" over an "objective reasonableness" standard, which is properly crafted to determine whether the force used constituted "punishment." Without guidance from this Court, however, other courts may continue to apply a "shocks the conscience" standard, and the inter- and intra-circuit conflicts will become greater as "shocks the conscience" fractures into hundreds of permutations which commingle *Johnson* factors with the Eighth Amendment, "deliberate indifference," "intent to punish," and "reckless disregard" tests. With so many permutations and varying resolutions of this issue among the circuits, the Third Circuit was faced with a difficult choice. In the future, many federal district and appellate courts will have to make similar choices, absent this Court's intervention to definitively answer the question it has previously reserved -- i.e., the proper test for pretrial detainee excessive force claims brought pursuant to the Fourteenth Amendment. Review by this Court is therefore warranted not only to resolve an ongoing circuit conflict, but more importantly, to ensure that pretrial detainees' higher constitutional protection against punishment in any form is not lost in the scramble.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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March
10, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1062

LUIS FUENTES,

Appellant

v.

WAGNER, WARDEN; KONEMANN, CORRECTIONAL OFFICER: KLEEMAN, CORRECTIONAL OFFICER; DONATO, CORRECTIONAL OFFICER; BROWN, SERGEANT; WERST, ASSISTANT WARDEN, BERKS COUNTY

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil Action No. 96-CV-03251)
United States Magistrate Judge: Hon. M. Faith Angell

Argued: December 15, 1999
Before: MANSMANN, GREENBERG and MCKEE,
Circuit Judges

(Filed: March 10, 2000)

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OPINION OF THE COURT

McKEE, *Circuit Judge.*

Luis Fuentes appeals a judgment that was entered for the defendant corrections officers and prison officials in this suit under 42 U. S. C. § 1983. The suit arose from an incident that occurred in the Berks County Prison where Fuentes was detained while awaiting sentencing on outstanding federal charges. Fuentes alleged a cause of action for excessive force under the Eighth and Fourteenth Amendments, a substantive due process claim for cruel and unusual punishment under the Eighth and Fourteenth Amendments, a

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1. Mr. Fuentes was granted *informa pauperis* status, and counsel agreed to represent him *pro bono.* We express our appreciation for the service counsel provided the court, and the quality of their advocacy on behalf of Mr. Fuentes.

procedural due process claim under the Fourteenth Amendment, and state law claims for assault and battery, and false imprisonment.[2]

Cross-motions for summary judgment were eventually filed, and the Magistrate Judge to whom the matter had been assigned granted summary judgment in favor of the prison officials on Fuentes' substantive due process claim, but denied summary judgment on the remaining claims. Those remaining claims then proceeded to trial, and a jury returned a verdict in favor of the defendants. Fuentes' post-trial motions were denied, and this appeal followed.[3] We will affirm.

I. BACKGROUND

In December of 1995, Fuentes was being housed in the behavioral adjustment unit ("BAU") of the Berks County Prison awaiting sentencing on federal drug charges to which he had previously pled guilty. His cell was typical of the cells in the BAU. It measured approximately 6 by 10 feet and contained only a sink, a toilet, and a cement slab.

On December 28, 1995, the inmates in the BAU were not allowed their one-hour exercise period outdoors because of inclement weather. Instead, they were individually released from their cells to exercise in the hallway immediately outside their respective cells. After another inmate finished exercising, Fuentes began kicking his own cell door and yelling for a Correctional

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2. Fuentes filed a *pro se* complaint on January 11, 1996. Thereafter, he was granted *ifp* status and counsel was appointed to represent him. A first amended complaint was filed on February 28, 1997, and a second amended complaint was filed on November 14, 1997.

3. All parties consented to have the Magistrate Judge conduct the proceedings under 28 U. S. C. § 636(c)(1). Fuentes retained the right to appeal directly to us under 28 U. S. C. § 636(c)(3).

Officer ("CO").[4] CO Konemann and CO Kleeman came to Fuentes' cell, and Fuentes complained that another inmate had urinated into Fuentes' cell. Neither Konemann nor Kleeman saw any urine on Fuentes' cell floor. However, Kleeman did notice some wetness on the door and the floor outside of Fuentes' cell.

Policy requires that a CO handcuff an inmate who is housed in the disciplinary unit before entering his cell. Accordingly, Konemann and Kleeman told Fuentes to extend his hands through the food slot of his cell door so that they could handcuff him and enter his cell. Fuentes complied, and was handcuffed. The COs entered and told Fuentes they were going to strip his cell because he had kicked his cell door.[5] However, as Konemann began removing sheets from Fuentes' bed in an effort to strip the cell, Fuentes grabbed the sheets and a struggle ensued. The parties offer different versions of exactly what happened next.

According to the defendants, Fuentes swung at Konemann's head with his handcuffed fists after unsuccessfully trying to grab the sheets. Konemann stated he saw Fuentes' swing, and that he pushed Fuentes backwards. When Fuentes moved back toward Konemann, Kleeman stepped forward and wrestled Fuentes to the floor. Fuentes was then face down on the cell floor with his handcuffed arms beneath him. Kleeman was partially on top of Fuentes as Konemann assisted in holding Fuentes down. According to the defendants, Fuentes was combative and was trying to free himself as Konemann and Kleeman tried to control him.

CO Donato arrived shortly after Konemann and Kleeman began stripping the cell, but Donato left to get leg shackles and to

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4. Fuentes knew that kicking his cell door was a violation of the rules of the BAU.

5. Cell stripping is a procedure which may be used when an inmate is causing a disturbance. It consists of removing from the cell all items except the clothes on the inmate's back, his legal papers and his toothbrush. For the first violation, the cell is stripped for 24 hours. For each subsequent infraction, an additional 24 hours is added.

call for assistance. After Donato retrieved the leg shackles she returned with several other COs, and the shackles were fastened around Fuentes' legs. Sergeant Brown, a supervising CO, did not enter Fuentes' cell, but he did hear Fuentes yelling at Kleeman and Konemann. Donato told Brown that Konemann and Kleeman had been stripping Fuentes' cell when Fuentes swung at Konemann. Brown then left to obtain permission to place Fuentes in a restraint chair. Permission was granted by Assistant Warden, who authorized use of the restraint chair for eight hours. Fuentes' civil rights claim is based upon the use of that restraint chair and his allegation that Konemann and Kleeman used excessive force during the initial confrontation in his cell.[6]

Fuentes was no longer physically resisting when Brown returned with permission to use the restraint chair. However, Kleeman and Konemann were still holding Fuentes down, and Fuentes was threatening to "get" Konemann. Fuentes was then carried from his cell to a nearby cell where he was placed in the restraint chair. He did not resist physically being placed in the chair, though he did not cooperate.

With regard to the initial confrontation in Fuentes' cell, Fuentes alleged that Konemann and Kleeman threw him to the floor

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6. The restraint chair at Berks County Prison is the "Pro-straint Violent Prisoner Chair." The back of the chair is angled back at a 45° angle. An inmate is placed in the chair with his arms handcuffed behind his back and his legs shackled. A restraint belt is fastened across the inmate's lap, and two more restraint belts are placed across his chest while another restraint belt secures his ankles. At Berks County Prison, it is standard operating procedure to shackle an inmate's legs, as well as cuffing his wrists. The handcuffs that are used are double-locked so they cannot loosen or tighten more than when initially set. The prison has three restraint chairs, and they are on wheels so that they can be moved between housing units. They are used in the female unit, the disciplinary unit and the mental health unit. The chairs are not used on general population inmates.

and beat him, and that Kleeman smeared his hand all over Fuentes' face. Fuentes denied trying to strike Konemann or threatening him. Fuentes insisted that he only asked Kleeman and Konemann why they were hitting him, and he claimed to have remained still from the time he was beaten until the time he was placed in the restraint chair. Kleeman admitted that Fuentes was no longer a threat to himself or anyone else once his hands were cuffed and his legs shackled. From the time Fuentes was removed from his cell to the time he was placed in the restraint chair, he was neither resisting nor physically combative. Fuentes was not given an opportunity to explain or defend any of his actions prior to being placed in the chair.

Fuentes' confinement in the restraint chair was consistent with the institution's policy. COs checked him at fifteen minute intervals and he was released every two hours for a ten minute period of stretching, exercise, and use of the toilet. In addition, he was given a meal and seen by the medical staff at the end of the first two hour interval. The parties disputed whether Fuentes made any verbal threats during his first release period. Fuentes denied doing so, however, Konemann said that Fuentes was still threatening him and saying that he would "get" Konemann when he got out on the street.

During the second release period, which came at the end of four hours, Fuentes told Konemann "he wasn't going to get away with it, that [Fuentes] was going to see him sooner or later . . . ." Konemann interpreted this as a threat. However, Fuentes claimed that he only meant that he was going to sue Konemann.

When the third release period arrived, Fuentes had stopped making threats. He was finally released at the end of eight hours and examined by a staff nurse, as dictated by policy. She noted that Fuentes complained of pain in his right lower rib cage, but she observed no injuries with the exception of small bruises or swelling on both wrists.

On December 29, 1995, Fuentes was brought before the prison disciplinary board for a hearing on charges of assault/fighting/horseplay, threats, refusal of orders, and disturbance. He was given an opportunity to make a statement. The assault

charge was dismissed but the board found him guilty of threats, refusal of orders and disturbance. Sanctions in the form of loss of all earned time credit and thirty days segregation were imposed.

Fuentes claimed that being in the restraint chair for eight hours resulted in loss of feeling in his hands and feet, cuts on his wrists and ankles where he had been handcuffed and shackled, leg cramps, discomfort in his arms, restricted breathing, and back pain.

II. DISCUSSION

Fuentes argues that the Magistrate Judge erred by: (1) denying his motion for judgment as a matter of law on his procedural due process claim; (2) granting summary judgment in favor of the defendants on his substantive due process claim; and (3) instructing the jury improperly on his excessive force claim.

A. The Procedural Due Process Claim.

Fuentes alleged that his eight hour confinement in the restraint chair violated the Fourteenth Amendment of the United States Constitution. The Magistrate Judge denied cross-motions for summary judgment on the procedural due process claim after finding that "the evidence demonstrates a genuine issue of material fact as to whether Mr. Fuentes was placed in the restraint chair for punitive reasons or security reasons. . . ." Op. at 15. After the jury found against him on his procedural due process claim, Fuentes moved for judgment as a matter of law. However, the Magistrate Judge denied that motion. Fuentes claims that was error.

We exercise plenary review over the denial of a motion for judgment as a matter of law, and we apply the same standard that the District Court should have used. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). A motion for judgment as a matter of law "should be granted only if, viewing the evidence in the light most favorable to the nonmovant . . . there is insufficient evidence from which a jury could reasonably find [for the nonmovant]. [We] may not weigh the evidence . . . The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon

which the jury could properly find a verdict for that party." *Id.* A jury must resolve any factual conflicts, not a court. *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 811 (3d Cir. 1985).

When Fuentes was placed in the restraint chair he was a convicted inmate awaiting sentencing. His status under the Constitution was therefore that of a pretrial detainee.[7] In *Cobb v. Aytch*, 643 F.2d 946, 962 (3d Cir. 1981), we clarified the legal status of convicted, but unsentenced, inmates. We stated:

> The trial judge, in fashioning relief, drew a distinction between pretrial detainees and convicted but unsentenced inmates. He concluded that 'the conviction alone appears to extinguish any 'liberty' interest formally derived from the fourteenth amendment.' We disagree. *The right to remain at liberty continues until a court pronounces a judgment of sentence, although after a jury has pronounced a guilty verdict the court may insist upon greater assurance that a defendant will submit to sentence.*

(emphasis added). Given Fuentes' status as a pretrial detainee under the Fourteenth Amendment, he has

> federally protected liberty interests that are different in kind from those of sentenced inmates. Unlike sentenced prisoners, who . . . must look to state law for the protection of their personal liberties, pre-trial detainees have liberty interests firmly grounded in federal constitutional law.

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7. Before the Magistrate Judge, the defendants conceded that for purposes of his § 1983 claim, Fuentes was to be regarded as a pretrial detainee. Op. at 9 n.17. In this appeal, the defendants argue that Fuentes' status is the same as a sentenced inmate. *See* Appellees' Br. at 13, 20. We reject that argument because it contravenes the concession made before the Magistrate Judge, and because it is simply wrong. *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

Id. at 957.[8]

Our analysis of Fuentes' procedural due process claim is governed by *Bell v. Wolfish*, 441 U.S. 520 (1979).[9] There, the Supreme Court wrote:

> [I]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think the proper inquiry is whether those conditions amount to punishment of the detainee.

Id. at 535. "[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* However, "[o]nce the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention." *Id.* at 537. Thus, "[r]estraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting. . . ." *Id.* at 540. Obviously, "ensuring security and order at the institution is a permissible nonpunitive objective,

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8. Fuentes' liberty interests are grounded in the Fourteenth Amendment because his allegations are against state actors as he was confined in a county prison.

9. The defendants, although discussing *Bell v. Wolfish*, rely, in part, on *Sandin v. Conner*, 515 U. S. 472 (1995), in support of their argument that Fuentes was not punished without due process of law. In *Sandin*, the Court held that liberty interests protected by the Due Process Clause "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause in its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U. S. at 484. However, *Sandin* does not apply here. *Sandin* concerned punishment of a sentenced prisoner, and therefore required a completely different analysis.

whether the facility houses pretrial detainees, convicted inmates, or both." *Id.* at 561. Consequently, "whether . . . restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive government purpose and whether they appear excessive in relation to that purpose." *Id.* Thus, there is a "distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Id.*

> [We] must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Id. at 538-39.

Fuentes has not clearly established that officials used the restraint chair as a means of "punishing" (as opposed to controlling) him. Accordingly, we must determine if this particular restriction, which may appear to be punitive, was really an incident of a legitimate nonpunitive objective. *Id.* at 539 n.20. "[A]bsent a showing of intent to punish, a court must determine if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." *Id.* "Retribution and deterrence are not legitimate nonpunitive governmental objectives." *Id.*

Fuentes argues that "a reasonable jury could only have concluded that the defendants confined [him] in the restraint chair — and kept him there for eight long hours — to punish him." Appellant's Br. at 38-39. He therefore claims that the Magistrate Judge erred in denying his motion for judgment as a matter of law.

Clearly, there is evidence in this record from which a reasonable jury could conclude that use of the restraint chair was punishment. Sergeant Brown testified that the chair is used in the disciplinary unit for behavior modification purposes. Warden Wagner testified that the restraint chair is used to abate an inmate's behavior, and that it is used for behavior modification and control. Perhaps most significantly, he also testified that there is nothing the inmate can do to affect the amount of time he will remain in the chair once the inmate is placed in it.

However, there is also evidence from which a reasonable jury could conclude that Fuentes was placed in the restraint chair to quell a disturbance and restore the order and security of the institution. Kleeman testified that the restraint chair is used to handle an aggressive inmate who is causing harm to himself or others. Kleeman and Konemann both testified that Fuentes kicked his cell door and swung his handcuffed hands at Konemann's head. Konemann testified that although Fuentes was not physically aggressive when released from the chair during the first and second rest periods, Fuentes did continue to make threats.

Given this conflicting evidence, we disagree with Fuentes' contention that a reasonable jury could only conclude that use of the chair was punitive. The evidence was sufficient to allow a jury to conclude that he was placed in the restraint chair to stop his disruptive behavior and maintain prison order and security. Accordingly, the Magistrate Judge did not err in denying Fuentes' motion for judgment as a matter of law. "Conflicting evidence which could reasonably lead to inconsistent conclusions will not justify" a judgment as a matter of law. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976). "It is the function of the trier of fact alone, the jury in this instance, to evaluate the evidence and to draw inferences therefrom." *Id.*

B. The Substantive Due Process Claim.[10]

Fuentes alleged that the use of the restraint chair violated his substantive due process rights under the Fourteenth Amendment, and constituted cruel and unusual punishment under the Eighth Amendment as a matter of law. However, the basis of his claim is elusive. The Magistrate Judge concluded that Fuentes was claiming that the use of the restraint chair is unconstitutional under any circumstances under the Eighth Amendment. *See* Op. at 15 ("[Fuentes] contends that the use of the restraint chair as a means of corporal punishment is 'cruel and unusual' and violates the Eighth Amendment."). However, in his brief to us, Fuentes conflates his substantive due process claim into his procedural due process claim by arguing that the central issue with respect to both is whether the use of the chair constituted punishment. The appellees describe Fuentes argument before us as follows:

> [Fuentes] appears to now contend that the district court should have considered only whether [he] was punished, not whether the alleged punishment was cruel and unusual. [Thus Fuentes'] argument with respect to the district court's ruling on [the substantive due process claim] relating to claims of cruel and unusual punishment is confusing at best.

See Appellees' Br. at 9.

Fuentes argues that the Magistrate Judge incorrectly analyzed his substantive due process claim under the Eighth Amendment rather than under the Fourteenth Amendment. He correctly asserts that his claim is governed by the Fourteenth Amendment guarantee of due process, and not the Eighth Amendment's prohibition against cruel and unusual punishment because he had not been sentenced

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10. We exercise plenary review over the grant or denial of a motion for summary judgment, applying the same standard that the district court should have used in the first instance. *Olson v. General Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996).

when the incident occurred."[11] Under the Fourteenth Amendment, a pretrial detainee is entitled "at a minimum, [to] no less protection" than a sentenced inmate is entitled to under the Eighth Amendment. *Colburn v. Upper Darby Township*, 838 F.2d 663, 668 (3d Cir. 1988). Fuentes claims that "the district court never even considered the amount of additional substantive protection to which [he] was entitled" under the Fourteenth Amendment by virtue of his status as a pretrial detainee. Appellant's Br. at 18-19.

In *Kost v. Kozakiewicz*, 1 F.3d 176, 188 n.10 (3d Cir. 1993), we noted that "pretrial detainees. . . are entitled to at least as much protection as convicted prisoners, so the protections of the Eighth Amendment would seem to establish a floor of sorts. It appears that no determination has as yet been made regarding how much more protection unconvicted prisoners should receive." Fuentes contends that, as an unsentenced inmate, he was entitled to be free from any punishment. However, that very issue was before the jury with respect to Fuentes' procedural due process claim, and, as we have indicated, the jury's determination in favor of the defendants on that issue was supported by sufficient evidence. Accordingly, even if the Magistrate Judge had applied a Fourteenth Amendment standard, Fuentes would not have prevailed at trial.

The Eighth Amendment protects against infliction of "cruel and unusual punishment." However, "not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth

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11. "The Cruel and Unusual Punishments Clause was designed to protect those convicted of crimes and consequently the Clause applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Whitley v. Albers*, 475 U. S. 312, 318 (1986) (citation and internal quotations omitted). Thus, its protections do not apply until "after conviction and sentence." *Graham v. Connor*, 490 U. S. 386, 392 n.6 (1989). The clause, and indeed the entire Eighth Amendment, is made applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U. S. 660 (1962).

Amendment scrutiny." *Whitley v. Albers*, 475 U. S. 312, 319 (1986). "After incarceration, only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Id.* (citation and internal quotations omitted). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Id.*

Resolution of an Eighth Amendment claim therefore "mandate[s] an inquiry into a prison official's state of mind." *Wilson v. Seiter*, 501 U. S. 294, 299 (1991). Two considerations define that inquiry. We must first determine if the deprivation was sufficiently serious to fall within the Eighth Amendment's zone of protections. *Id.* at 298. If not, our inquiry is at an end. However, if the deprivation is sufficiently serious, we must determine if the officials acted with a sufficiently culpable state of mind. *Id.* In other words, we must determine if they were motivated by a desire to inflict unnecessary and wanton pain. "What is necessary to establish an 'unnecessary and wanton infliction of pain'. . . varies according to the nature of the alleged constitutional violation." *Hudson v. McMillian*, 503 U. S. 1, 5 (1992).

When excessive force is alleged in the context of a prison disturbance, the subjective inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 7. The objective inquiry is whether the inmate's injury was more than *de minimis*. *Id.* at 9-10.

When an Eighth Amendment claim arises in the context of a challenge to conditions of confinement, we must determine if prison officials acted with "deliberate indifference" to the inmate's health. *Farmer v. Brennan*, 511 U. S. 825, 837 (1994).[12] The objective

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12. In *Farmer v. Brennan*, the Court finally defined "deliberate indifference," which first appeared in *Estelle v. Gamble*, 429 U. S. 97, 104 (1976). The Court required a showing that the prison official was "subjectively aware of the risk." 511

inquiry is whether the inmate was "denied the minimal civilized measure of life's necessities." *Hudson*, 503 U. S. at 9.

Fuentes contends that his substantive due process claim does not neatly fit into either the "excessive force" category or the "conditions of confinement" category. Nonetheless, he argues, not only that the Magistrate Judge erred by granting summary judgment to the prison officials on his hybrid substantive due process claim, but also that he should have been granted summary judgment on that claim. He argues in the alternative that the claim should at least have been submitted to the jury. We disagree.

Fuentes' due process claim is limited to use of the restraint chair. It does not encompass the force initially used to subdue him, or to place him in the chair. Accordingly, whether analyzed as an excessive force claim or a conditions of confinement claim, Fuentes had to demonstrate that the prison officials had a "sufficiently culpable state of mind," to establish that use of the restraint violated the Eighth Amendment. It is obvious that prison officials were not "deliberately indifferent" to his health or well-being in employing the restraint chair, and a conditions of confinement analysis therefore requires little discussion.

It is undisputed that the prison policy for the use of the restraint chair was followed here. Accordingly, Fuentes was not kept in the chair any longer than had been authorized, his physical condition was checked every 15 minutes, and he was released every two hours for 10 minutes to allow stretching, exercise, and use of the

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U. S. at 829. It wrote: "We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

toilet. He was given food, and he was examined by a nurse at the end of the eight hour confinement.[13]

Moreover, even if we assume that the injuries Fuentes alleges were sufficiently serious to establish an Eighth Amendment violation, there is no evidence that prison officials placed him in the chair "maliciously and sadistically to cause harm." Fuentes argues that the prison officials' conduct was malicious and sadistic because (1) there was no need to use the restraint chair; (2) the restraint chair was much too severe a response under the circumstances; (3) the prison officials did not perceive him as an immediate threat when they placed him in the chair; and (4) the prison officials made no effort to temper the severity of their response even though it was clear that he posed no threat to institutional security. Appellant's Br. at 30. However, even if we concede each of these assertions, Fuentes has established at most that prison officials overreacted to the disturbance that he caused. Given the totality of the circumstances surrounding use of the restraint chair here, any such over-reaction would still fall short of supporting a finding that prison officials acted "maliciously and sadistically to cause harm."

Consequently, the Magistrate Judge did not err by granting summary judgment in favor of the defendants on Fuentes' substantive due process claim.

C. The Jury Instructions on Excessive Force.[14]

Fuentes alleged that Konemann and Kleeman used excessive force in violation of the Fourteenth Amendment. Fuentes also alleged that Donato was liable because she observed the use of

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13. These same factors that establish that the prison officials were not deliberately indifferent also establish that Fuentes was not "denied the minimal civilized measure of life's necessities."

14. We exercise plenary review in determining whether jury instructions misstated an applicable legal standard. *Parks v. AlliedSignal, Inc.*, 113 F.3d 1327, 1330 (3d Cir. 1997).

excessive force and failed to intervene with respect to the initial confrontation in his cell. Over Fuentes' objection, the Magistrate Judge charged the jury on excessive force as follows:

> [Plaintiff must show by a preponderance of the evidence, that one or more of the defendants inflicted unnecessary and wanton pain and suffering. You must decide whether the force applied was in a good faith effort to maintain or restore discipline, in which case, you must find that the defendants did not use excessive force, or whether the force applies (sic) was inspired by an unwise, excessive zeal, amounting to an abuse of official power, that shocks the conscience, in which case, you must find that one or more of the defendants did use excessive force.

Fuentes argues that this charge "compelled [him] to meet a much higher burden than an unsentenced inmate is required to meet in order to prove an excessive force claim." Appellant's Br. at 47. He argues that the "objective reasonableness" instruction he proposed should have been given to the jury instead.[15]

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15. Fuentes' proposed excessive force jury instruction reads:

> In order to prove that the defendants used excessive and unnecessary force, the plaintiff must prove by a preponderance of the evidence: (1) that the plaintiff suffered some harm, (2) that the harm resulted directly from the use of force that was clearly excessive in relation to any need for the use of force, and (3) that the excessiveness of the force was objectively unreasonable in light of the facts and circumstances at the time.
>
> Some of the factors you may consider in determining whether the defendants used excessive force are: (1) the extent of the injury suffered, (2) the need for the use of force, (3) the relationship between that need and the amount of force used, (4) the threat reasonably perceived by the prison guards

However, Fuentes was not entitled to an "objective reasonableness" instruction. The "objective reasonableness" test has its constitutional foundation in the Fourth Amendment and is properly applied in excessive force claims arising from investigatory stops and/or arrests. *Graham v. Connor*, 490 U. S. 386 (1989). The Court in *Graham* specifically stated:

> Our cases have not resolved the question of whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. *It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.*

490 U. S. at 395 n.10 (citations omitted)(emphasis added).

Our conclusion that Fuentes was not entitled to an "objective reasonableness" instruction does not, however, completely meet Fuentes' claim of error. Fuentes' essential point is that the instruction given to the jury was an Eighth Amendment excessive force instruction applicable to sentenced inmates and inapplicable to him. He argues that his excessive force claim should have been analyzed under the *Bell v. Wolfish* "conditions of confinement" standard because he was a pretrial detainee. He insists that he was not required to prove that he experienced "wanton pain and suffering" or to establish that the application of force upon him "was inspired by an unwise, excessive zeal, amounting to an abuse of official power" or to prove that the conduct of Konemann, Kleeman and Donato "shocked the conscience."

However, we agree with the contrary analysis in *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993). There, the court also addressed a pretrial detainee's excessive force claim against a prison guard. The claim arose from a prison disturbance. The court

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involved; and (5) any efforts made to temper the severity of the forceful response.

initially looked to *Bell v. Wolfish* for guidance in determining the standards to be applied. However, it found that *Bell,* while working "well for claims of improper conditions or restrictions, . . . does not lend itself to analysis of claims of excessive force in controlling prison disturbances." *Id.* at 1446. The court reasoned:

> In *Bell,* the Court stated that the government must be able to take steps to maintain security and that "[r]estraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment . . . ." *Bell* further noted that there is no reason to distinguish between pretrial detainees and convicted inmates in reviewing challenged security practices because there is no basis to conclude that pretrial detainees pose any lesser security risk than convicted inmates.
>
> For these reasons, we conclude that excessive use of force claims by pretrial detainees should not be analyzed under Bell's conditions of confinement standard. Instead, we are guided by the standard announced in *Whitley* and *Hudson.* While these cases specifically addressed claims of excessive use of force brought by convicted prisoners, it is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security. Moreover, the Court indicated in *Hudson* that many of its concerns in *Whitley* were not limited to Eighth Amendment claims but "arise whenever guards use force to keep order." It further observed that claims based on excessive force and claims based on conditions of confinement are different in kind.
>
> Therefore, when a court is called upon to examine the amount of force used on a pretrial detainee for the purpose of institutional security, the appropriate analysis is that announced in *Whitley* and *Hudson*: whether the measure taken inflicted unnecessary and wanton pain and suffering depends on "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm."

Id. Accordingly, we hold that the Eighth Amendment cruel and unusual punishments standards found in *Whitley v. Albers*, 475 U. S. 312 (1986) and *Hudson v. McMillian.*, 503 U. S. 1 (1992), apply to a pretrial detainee's excessive force claim *arising in the context of a prison disturbance.* We can draw no logical or practical distinction between a prison disturbance involving pretrial detainees, convicted but unsentenced inmates, or sentenced inmates. Nor can prison guards be expected to draw such precise distinctions between classes of inmates when those guards are trying to stop a prison disturbance.

Consequently, Fuentes' objections to having to prove "wanton pain and suffering" and "an unwise excessive zeal, amounting to an abuse of official power," were properly overruled. We are not troubled by the court's instruction requiring Fuentes to establish that the challenged force was motivated by a desire to inflict "wanton pain and suffering." That requirement is nothing more than a restatement of the requirement that Fuentes establish that the force was "inspired by an unwise, excessive zeal, amounting to an abuse of official power." That requirement in turn amounts to nothing more than the application of force "maliciously and sadistically for the very purpose of causing harm."

However, Fuentes' objection to having to prove that the prison guards' conduct "shocked the conscience," as required by the instruction, is somewhat more troublesome. Although "shocks the conscience" is a term of art in Fourteenth Amendment substantive due process jurisprudence, *see Rochin v. California*, 342 U. S. 165, 172-73 (1952), our recent decisions suggest that the standard may only apply to police pursuit cases. *See Fagan v. City of Vineland*, 22 F.3d. 1296, 1306 (3d Cir. 1994); *see also Kneipp v. Tedder*, 95 F.3d 1199, 1207-08 (3d Cir. 1996) ("We believe that the *Fagan II* shocks the conscience standard is limited to police pursuit cases. . . ."). Furthermore, in *Valencia v. Wiggins, supra*, the court rejected the contention that a pretrial detainee bringing an excessive force claim arising from a prison disturbance had to demonstrate that the prison guards' conduct "shocked the conscience."

Nonetheless, we believe that, in light of the Supreme Court's decision in *County of Sacramento v. Lewis*, ___ U. S. ___, 118 S. Ct. 1708 (1998), the "shocks the conscience" standard is not

inappropriate to an excessive force claim in the context of a prison disturbance. *Lewis* involved a high speed police chase of a motorcycle that ended in the death of the passenger of the fleeing motorcycle. The parents of the decedent sued under 42 U.S.C. § 1983 alleging that the police conduct violated the constitutional rights of the decedent. The Court's analysis of the police conduct clarifies that the "shocks the conscience" standard of culpability applies in those instances where the police officer must instantaneously respond to a situation without opportunity for reflection on his or her actions. 118 S. Ct. at 1721.

In concluding that the "shocks the conscience" standard applies to police pursuit cases, the Court analogized the police officers' situation in a pursuit case to that of prison officials who have to immediately respond to a violent prison disturbance to restore and to maintain order and security. *Id.* at 1720 ("The analogy to sudden police chases (under the Due Process Clause) would be hard to avoid.").

Moreover, in *Hudson v. McMillian*, the Court noted that:

> the officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. . . . Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need to maintain or restore discipline through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that [p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. In recognition of these similarities, we hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Hudson, 503 U.S. at 6-7 (citations and internal quotation marks omitted).

Here, Kleeman, Konemann and Donato were faced with Fuentes' disruptive and violent behavior for which they were not to blame. They could not take time to reason through various options to determine the most appropriate response. Rather, they had to quickly respond in order to quell the disturbance Fuentes was creating, and minimize the possibility of an escalating disruption inside the prison. Under those circumstances, we believe that the "shocks the conscience" test that the Supreme Court has utilized in analogous situations, including high speed chases, is the appropriate gauge of the conduct. Accordingly, we find no error in the Magistrate Judge's jury instruction.

III. CONCLUSION.

For all of the reasons set forth above, we will affirm.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE LOUIS FUENTES	:	*CIVIL ACTION*
v.	:	
C/O KONEMANN, et al.	:	*NO. 96-3251*

MEMORANDUM AND ORDER

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE

May 28, 1998

Presently before this Court are cross-motions for summary judgment in a prisoner's civil rights § 1983 action.[16] Plaintiff, represented by court-appointed counsel, has brought suit against the Warden and Assistant Warden of Berks County Prison, three Correctional Officers employed by the prison, their supervisory officer and Berks County.

I. FACTS[17]

The incident giving rise to this civil rights action occurred mid-afternoon on December 28, 1995. At that time, Mr. Fuentes was a federal inmate housed at Berks County Prison while awaiting sentencing on federal charges. He was housed in the behavioral

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16. Pursuant to 28 U.S.C. §636(c), the parties has [sic] voluntarily consented to have me conduct all further proceedings in this matter, including trial and the entry of a final judgment.

17. The facts in this discussion are undisputed for the purposes of summary judgment, unless otherwise noted.

adjustment unit ["BAU"], which is located within the disciplinary unit of the prison.[18]

On December 28, 1995, because of bad weather outside, the inmates in the BAU were not permitted to take their one-hour exercise period outdoors, instead they were individually released from their cells to conduct their exercise in the hallway immediately outside their cells.

Following the exercise period of another inmate in the BAU, Fuentes began yelling for a Correctional Officer ["C/O"] and kicking his cell door. When C/O Konemann and C/O Kleeman came to Fuentes' cell, he complained that another inmate had urinated through a crack in his (Fuentes') door during the exercise period. At the time that he kicked the cell door, Fuentes was aware that this behavior violated the rules of the disciplinary unit.[19] Konemann and Kleeman did not see any urine on the floor, however, Kleeman and C/O Donato noticed some wetness on the door and the floor outside of Fuentes' cell.[20]

Konemann and Kleeman told Fuentes to extend his hands through the food slot of the cell door in order to be handcuffed.[21] Fuentes complied and was handcuffed. Konemann and Kleeman then entered the cell and told Fuentes that they were stripping his cell because he had kicked his cell door.[22]

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18. Fuentes had been transferred to the BAU as the result of an attempted escape from the prison several months earlier.

19. Fuentes Deposition at 28, 35.

20. Konemann Deposition at 90; Kleeman Deposition at 41-42; Donato Deposition at 23.

21. Prior to entering a cell in the disciplinary unit, the C/O is required to handcuff the inmate. Kleeman Deposition at 18.

22. Cell stripping is a procedure which may be used when an inmate is causing a disturbance. Cell stripping consists of removing from the cell all items except the clothes on the

When Konemann began removing Fuentes' sheets, he protested and grabbed at the sheets.[23] A struggle ensued.

The parties give very different versions of what occurred next. According to the Defendants, after Fuentes unsuccessfully grabbed at his sheets, he took a swing at Konemann, aiming at Konemann's head with his handcuffed fists. Konemann saw the swing and reacted by pushing Fuentes backwards in order to create space between them. When Fuentes again moved forward toward Konemann, Kleeman stepped forward and wrestled Fuentes to the floor. Fuentes was face down on the cell floor with his handcuffed arms beneath him and Kleeman partially on top of him. Konemann assisted in holding Fuentes down. Fuentes was combative and was trying to free himself. C/O Donato, who had arrived sometime after Konemann and Kleeman began stripping the cell, was asked to get leg shackles and to call for assistance. Donato returned with the leg shackles and several other officers, including the supervising officer, Sergeant Kevin Brown. Leg restraints were placed on Fuentes. Sergeant Brown heard Fuentes yelling at Konemann and/or Kleeman. Donato told Sergeant Brown that Konemann and Kleeman had been in the process of stripping Fuentes' cell for creating a disturbance when he took a swing at Konemann. Brown called Assistant Warden Elliott Werst, told him what had happened and asked for permission to place Fuentes in a restraint chair because he had attempted to assault an officer.[24] Assistant Warden Werst

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inmate's back, his legal papers and his toothbrush. For the first violation of unit rules the inmate's cell is stripped for a twenty-four hour period; for each subsequent infraction, an additional 24 hours is added. Konemann Deposition at 42; Kleeman Deposition at 14.

23. It is undisputed that Fuentes told Konemann and Kleeman that the cell-stripping was "bullshit" and that he wanted to speak to a "white shirt"[a Sergeant or Lieutenant]. Fuentes Deposition at 42; Konemann Deposition at 96.

24. The restraint chair used at Berks County Prison manufactured by AEDEC International Inc. and is identified as "the Pro-straint Violent Prisoner Chair". It is advertised as "the 'cell'

gave permission to place Fuentes in the restraint chair for eight hours. When Sergeant Brown arrived back at Fuentes' cell after telephoning the Assistant Warden, Fuentes, who continued to be held down by Konemann and Kleeman, was not resisting but was threatening the officers, stating that he was going to "get" Konemann. Fuentes was carried into a nearby cell, and placed in the restraint chair. He did not cooperate in the process, however, he did not resist efforts to restrain him.

According to Fuentes, after he protested the stripping of his cell, both verbally and by grabbing at his sheets, Konemann and Kleeman roughed him up and banged him around. Specifically, Fuentes alleges that the officers hit him in the ribs, shoved him against the wall, threw him on the floor and then Kleeman smeared his hand all over Fuentes' face. Fuentes denies swinging, or attempting to swing, his handcuffed fists at Konemann. While Fuentes remembers asking the officers why they were hitting him, he

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the size of a chair [...] a humane and practical solution for the violent or despondent prisoner." The chair is made out of heavy plastic and leans back on a 45-degree angle. The inmate is placed in the chair with his hands handcuffed behind his back and set into a molded indentation in the chair. The inmate sits with his hands behind him, with a restraint belt across his lap, two restraint belts criss-crossing his chest and a restraint belt across his ankles.

At Berks County Prison, standard operating procedure for securing an inmate in the pro-straint chair is to shackle his legs, as well as handcuffing his wrists. Both sets of cuffs are to be double-locked, so that they can't become any looser or tighter than they are initially set. Werst Deposition at 45; Konemann Deposition at 141, 147.

There are three restraint chairs used at Berks County Prison. They are on wheels and are used in the female unit, the disciplinary unit and the mental health unit. The restraint chair is not used on the general population inmates. Werst Deposition at 46.

denies threatening them. According to Fuentes, he remained still during the incident from the time he was beaten through the time he was placed in the restraint chair.

Kleeman testified that once handcuffs and leg shackles were placed on Fuentes, he no longer considered him to be a threat to himself or anyone else.[25] It is undisputed that at the time Fuentes was moved from his cell to a neighboring cell to be placed in the restraint chair, he was not resisting, nor was he physically combative. It is further undisputed that prior to being placed in the restraint chair, Mr. Fuentes was not given an opportunity to explain his side of the story.[26]

Consistent with Berks County Prison's Standard Operating Procedures, Fuentes was checked by prison officers at fifteen minute intervals while he was in the restraint chair. He was released every two hours, for a ten minute period of stretching, exercise and use of the toilet.

After two hours in the restraint chair, Fuentes was given a meal and he was seen by the medical staff. The parties dispute whether Fuentes made any verbal threats during his first release period. Fuentes asserts he did not, however, Konemann claims that Fuentes was still threatening him, stating that he (Fuentes) would get Konemann when he got out on the street.[27]

During the second release period of four hours, Fuentes told Konemann "he wasn't going to get away with it, that I [Fuentes] was going to see him sooner or later, we are going to see again." The Defendants interpreted this as a threat. Fuentes argues that he merely intended that statement to mean that he was going to sue Konemann for his actions.[28]

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25. Kleeman Deposition at 97.

26. Brown Deposition at 15.

27. Konemann Deposition at 163.

28. Fuentes Deposition at 55; Brown Deposition at 22.

By the third release period, Fuentes had stopped making threats.[29] At the end of eight hours, Fuentes was released from the restraint chair and examined by a staff nurse, as part of the routine procedure. The nurse who examined Fuentes, Ihona Boraks-Pielechaty, noted in her report that Fuentes complained of pain in his lower rib cage, on the right side. She noted no injuries upon visual inspection, with the exception of small edemas on both wrists.[30]

On December 29, 1995, Mr. Fuentes was brought before the prison disciplinary board for a hearing. As a result of the December 28th incident, Fuentes was charged with assault/fighting/horseplay, threats, refusal of orders, and disturbance. Fuentes was given an opportunity to give a statement. The disciplinary board found Fuentes guilty of threats, refusal of orders and disturbance, "based on the officer's report and testimony." However, the assault charge was dismissed. Sanctions in the form of loss of all earned time credit and thirty days segregation were imposed.

Fuentes claims that as a result of being placed in the restraint chair for eight hours, he suffered the following injuries: loss of feeling in his hands and feet; cuts on his wrists and ankles where the cuffs were placed; leg cramps; discomfort in his arms; restricted breathing and continuing, intermittent pain in his back.[31]

Mr. Fuentes brought this action under 28 U.S.C. §1983 alleging, against all defendants, Eighth and Fourteenth Amendment violations for cruel and unusual punishment [Count II], and deprivation of liberty without Due Process [Count III]. Additional counts include: use of excessive force in violation of the Eighth and Fourteenth Amendment against C/O Konemann, C/O Kleeman, and C/O Donato [Count I]; assault and battery against Konemann and Kleeman [Count IV]; and false imprisonment against Konemann, Kleeman, Donato, Sergeant Brown and Assistant Warden Werst [Count V].

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29. Konemann Deposition at 163.

30. Boraks-Pielechaty Deposition at 9-13.

31. Fuentes Affidavit.

II. DISCUSSION

A. Defendants' Motion for Summary Judgment.

Defendants Berks County, Sergeant Kevin Brown, Assistant Warden Elliott Werst and Warden George Wagner have moved for summary judgment on all counts. Defendant Berks County argues that it is entitled to summary judgment on Counts II and III because Plaintiff has adduced no evidence to establish a custom or policy of violating inmates' constitutional rights. Defendants Brown, Werst and Wagner argue that they are entitled to summary judgment because Plaintiff has adduced no evidence to establish supervisory liability against them.

According to the Defendants, Berks County Prison's policy regarding the use of the restraint chair is not *per se* unconstitutional, but rather constitutes a reasonable method for maintaining and restoring discipline and order among the most unruly inmates in the prison, such as the Plaintiff, who was incarcerated in the prison's disciplinary unit.

B. Plaintiff's Motion for Summary Judgment.

Plaintiff has moved for summary judgment on Counts II and III against all of the defendants. Plaintiff argues that: (1) use of the restraint chair for punitive purposes without a prior hearing violated his right to procedural Due Process; and (2) use of the restraint chair violated his right to substantive Due Process and constituted cruel and unusual punishment under the Eighth Amendment.

C. Standard of Review.

Summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.Pro. 56(c). It is the moving party's burden to identify the portions of the admissible evidence that demonstrate the absence of a material factual issue. The substantive law governing the dispute will determine which facts are material; only facts "that might affect the outcome of the suit under the governing law will properly

preclude the entry of summary judgment." *Asquith v. Volunteers of America*, Civ.A. 95-300 (JEI), 1998 WL 149452 at *3 (D.N.J. March 20, 1998)*(quoting Matsushita Elec. Idus. Co. V. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. American Tele. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986).

To survive a motion for summary judgment, the non-moving party must do more than just repeat the allegations of his complaint, the party must present evidence showing a genuine issue for trial. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Asquith*, Civ.A. 95-300(JEI), 1998 WL 149452 at *3 (D.N.J. March 20, 1998).

The applicable legal standards by which a court decides a summary judgment motion do not change when the parties file cross-motions for summary judgment. The standards described above apply to each party's motion for summary judgment. *Manufacturers Life Insurance v. Dougherty*, 986 F.Supp. 928, 930 (E.D. Pa 1997) (*quoting Appelmans v. City of Philadelphia*, 826 F.2d 214, 216 (3d Cir. 1987).

III. ANALYSIS

A. Count III: Procedural Due Process Under the Fourteenth Amendment.

The parties have agreed, for the purposes of deciding the cross-motions for summary judgment, that Mr. Fuentes, at the time he was placed in the restraint chair, may be considered a pretrial detainee.[32] Thus, the Due Process Clause of the Fourteenth

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32. *See* N.T. 4/3/98 at 39 (At oral argument on the cross-motions for summary judgment, Counsel for the Defendants conceded, "I would agree that the weight of authority [is] that this man is considered a pretrial detainee."). *See also Cobb v. Aytch*, 643 F.2d 946, 962 (3d Cir. 1981)(holding that there

Amendment, rather than the Cruel and Unusual Punishment Clause of the Eighth Amendment, is the governing law to be applied to Count III.

Under the Due Process Clause of the Fourteenth Amendment, a pretrial detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. While "regulatory restraints" may be imposed, the imposition of punitive measures on pretrial detainees is unconstitutional. In order to determine whether a particular restriction or condition accompanying pretrial detention amounts to punishment in the constitutional sense of that word, the court must decide whether the restriction is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. *Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

"Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Wolfish*, 441 U.S. at 538-39 (1979)(*quoting Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

If a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." The Government has a legitimate interest in maintaining jail security. Ensuring security and order at the prison is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both. Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Wolfish*, 441 U.S. at 539, 547, 561 (1979).

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is no distinction between pretrial detainees and convicted but unsentenced inmates with respect to federal liberty interests).

However, prison officials cannot justify punishment of pretrial detainees. Retribution and deterrence are not legitimate nonpunitive governmental objectives. *Wolfish*, 441 U.S. at 539 n. 20. If a restriction or condition is not reasonably related to a legitimate goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. *Wolfish*, 441 U.S. at 539 (1979).

In the instant case, the key is whether the prison officials' decision to place Mr. Fuentes in the restraint chair had a punitive purpose. The evidence is conflicting.

Sergeant Kevin Brown, who requested permission to place Mr. Fuentes in the restraint chair, testified that the restraint chair was used in the disciplinary unit of Berks County Prison for behavior modification purposes. Sergeant Brown explained the purpose of the restraint chair as follows: "Basically somebody who's acting violently, when we put them in the chair, they pretty much fight against the restraints, you know burn off all that energy and their anger so they're controllable once again."[33] In Mr. Fuentes' case, upon arriving at the disciplinary unit in response to a call for assistance, Sergeant Brown was told by C/O Donato that Mr. Fuentes had swung at an officer while his cell was being stripped for causing a disturbance. Sergeant Brown did not enter the cell to observe the situation nor did he speak to Mr. Fuentes, but he could hear Mr. Fuentes yelling at C/O Konemann and/or Kleeman. Sergeant Brown then walked to the office and called Assistant Warden Werst to request permission to place Mr. Fuentes in the restraint chair because he had attempted to assault an officer. Without any discussion about Mr. Fuentes' current behavior, Assistant Warden Werst gave permission to place Mr. Fuentes in the restraint chair for eight hours.[34]

Assistant Warden Werst testified that he considers the restraint chair to be an effective tool in prison administration because

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33. Brown Deposition at 44.

34. Brown Deposition at 6-10.

"it is a secure way of restraining an inmate."[35] According to Asst. Warden Werst he authorized use of the restraint chair on Mr. Fuentes "because the inmate had attempted to assault a correctional officer who was performing his duties and had continued to resist and threaten the staff present." In placing Mr. Fuentes in the restraint chair, Werst hoped "to abate the behavior, to make it -- to be able to control the inmate and end his efforts to assault staff members." In contrast to Sergeant Brown's recollection of his conversation with Werst prior to placing Mr. Fuentes in the restraint chair, Werst testified that he was told that Mr. Fuentes was continuing to make verbal threats to staff members. According to Werst, a description of the inmate's current behavior was typically included in the information he asks for, and receives, from Sergeants who seek authorization to use the restraint chair.[36]

Warden George Wagner testified that he was involved in the initial decision to use restraint chairs at Berks County Prison; he recommended its use as a behavior modification and control tool. Use of the restraint chair is intended to send a message to the prisoner that: "we [the prison officials] will control their behavior if they can't [... and] there is always and there always must be a clear understanding that, for every behavior there is a consequence." Warden Wagner views the restraint chair as a successful behavior modification tool because its use in the prison has declined over the years.[37]

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35. Werst Deposition at 49-50.

36. Werst Deposition at 14-16.

37. Wagner Deposition at 34, 50. According to Warden Wagner:

> "[The restraint chair is effective] [f]or certain types of behavior, and I would say necessarily for a type of behavior modification. Once you have an inmate to the point where every other attempt has failed and you impose disciplinary segregation and there's little you can do to change their behavior, yes, it's effective. It's kind of, like, the last thing that we use.

According to Warden Wagner, the factors which he considers in deciding whether to authorize use of the restraint chair include: "the inmate; the behavior that's being demonstrated; how long the behavior has been demonstrated; what type of behavior it is; if it's known his past history for that type of behavior; his past conduct record in general if its known; [the] type of threats being made; why the inmate is making the threats; what the motivation is for the inmate; those type of things."[38] A Shift Commander may not call for authorization to use the restraint chair unless he has been to the area where the problem is taking place and has spoken to the inmate.[39] Warden Wagner typically authorizes eight hours in the restraint chair because "eight hours is the amount of time in a jail setting which isn't significant for the restriction of liberty, the freedom to move about, if you will. And long enough we believe to get a message across to inmates, and we believe it's the outside limit that demonstrates whether or not an inmate was simply -- and I shouldn't say simply -- whether or not an inmate is and was demonstrating behavior based upon anger that has to be changed and that we have to change, or whether they are truly mentally ill."[40]

Wagner testified that there is nothing an inmate can do while in the restraint chair to alter the amount of time which has been authorized; his behavior while in the restraint chair does not affect when he will be released from the chair. "When an inmate is in the chair, part of what's happening, not necessarily at this point, let's say an hour or two into the chair, it's no longer to compel a person to

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It's borne out by the documentation at this point, and by the fact that I can tell you that we're using it less, with more inmates, since it's inception than ever before. So, that shows it's effective." Wagner Deposition at 110-11.

38. Wagner Deposition at 33-35; 41.

39. Wagner Deposition at 79.

40. Wagner Deposition 48-49.

cease acting in a particular way. It's to modify the person's behavior."[41]

The Berks County Prison's Standard Operating Procedures permit use of the restraint chair for security reasons "if a Shift Commander believes it's necessary to control a violent or destructive inmate."

Correctional Officer Kleeman testified that he understood the purpose of the restraint chair as being a way of handling an aggressive inmate who was causing harm to himself or others.[42] According to Kleeman, after Mr. Fuentes swung at Konemann, and then lunged at him, he (Kleeman) pulled Fuentes to the ground and put his weight on top of Fuentes. Before being moved to the neighboring cell, Mr. Fuentes continued to be agitated and tried to get up. Mr. Fuentes continued to make verbal threats against the Correctional Officers.[43] This characterization of Mr. Fuentes' behavior is confirmed by C/O's Donato and Kleeman.[44]

Correctional Officer Kleeman characterized the use of the restraint chair on Mr. Fuentes as punishment for assaulting Correctional Officer Konemann.[45] Correctional Officer Kleeman explained that use of the restraint chair "let's them [the inmates] think about what they did wrong."[46] According to Correctional Officer Donato, the restraint chair is "absolutely" beneficial in deterring improper behavior. "I have never seen a person, since I was there, put on it a second time. They have never performed the

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41. Wagner Deposition 78-79, 103.

42. Kleeman Deposition at 33.

43. Kleeman Deposition at 74, 87, 92.

44. Donato Deposition at 40, 63. Konemann Deposition at 140-41.

45. Kleeman Deposition at 180.

46. Konemann Deposition at 188.

behavior a second time after that. [. . .] They don't do it a second time. They don't want to go back into the chair and sit there again and do nothing."[47]

Because the evidence demonstrates a genuine issue of material fact as to whether Mr. Fuentes was placed in the restraint chair for punitive reasons or security reasons, I will deny both parties' motions for summary judgment on Count III.

B. Count II: Substantive Due Process Under the Eighth Amendment.

Defendants argue that "there is simply no *per se* violation of an inmate's Eighth Amendment rights by placing him in a restraint chair in accordance with the policy adopted at Berks County Prison." Conversely, Plaintiff contends that the use of the restraint chair as a means of corporal punishment is "cruel and unusual" and violates the Eighth Amendment.

As both parties agrees, the test to be applied by the court in considering Eighth Amendment prisoner claims includes an objective and a subjective component. The first question is: was the deprivation suffered by the prisoner objectively "harmful enough" to establish a constitutional violation? The second part of the test focuses on whether the prison officials acted with a sufficiently culpable state of mind. *See Wilson v. Seiter*, 501 U.S. 294, 298 (1991). *See also LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993). The inquiry is modified slightly depending upon the type of Eighth Amendment violation which is alleged. *Collins v. Klotz*, Civ.A. No. 92-3772, 1994 WL 371479 at *3 (E.D. Pa 1994).

When it is alleged that prison conditions and practices violate the Eighth Amendment, the two part analysis inquires whether: (1) the deprivation was sufficiently serious; and (2) the official exhibited deliberate indifference to the inmate's health. *Collins*, 1994 WL 37149 at *4 (E.D. Pa. 1994)(*quoting, Wilson v. Seiter*, 111 S. Ct. 2321, 2326 (1991)). Under the first inquiry, only those deprivations denying "the minimal civilized measure of life's necessities' are

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47. Donato Deposition at 65-66.

sufficiently grave to form the basis of an Eighth Amendment violation. [citations omitted]" *Wilson v. Seiter*, 501 U.S. at 298 (1991) (*quoting Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

When the Eighth Amendment claim includes an allegation of excessive force, the subjective inquiry is whether the official acted in "a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm." *Collins*, 1994 WL 371479 at *3 (E.D. Pa. 1994)(*quoting Hudson v. McMillian*, 112 S.Ct. 995, 999 (1992)). When assessing the defendant's behavior, the fact finder should consider the following factors: (1) the extent of the Plaintiff's injuries; (2) the need for application of force; (3) the correlations between the need and the amount of force used; (4) the threat reasonably perceived by the Defendant; and (5) any efforts made by the defendant to temper the severity of a forceful response. Id.

In the instant case, as the Plaintiff argues, neither the excessive force nor the conditions of confinement cases "appl[y] neatly to the claim at issue in this case" which the Plaintiff defines as the constitutionality of "the routine use of the restraint chair as a means of punishment under a carefully considered policy established by high-ranking prison officials." *See* Plaintiff's Memorandum of Law in Support of His Motion for Summary Judgment at 26.

Based upon my review of the recent caselaw, and viewing, for the purposes of summary judgment all facts and reasonable inferences in favor of the Plaintiff, I conclude that Berks County Prison's routine use of the restraint chair under the existing written policy falls short of the threshold deprivation necessary to form the basis of an Eighth Amendment violation. *See Collins*, 1994 WL 371479 at *4 (E.D. Pa. 1994)(*quoting LeMaire*, 12 F.3d at 1456)).

The Berks County Prison policy, as written, permits use of the restraint chair for security purposes when "a shift commander believe[s] it necessary to place a violent or destructive inmate into the restraint chair." Testimony by the Warden and Assistant Warden establishes that the restraint chair is not used for the general population; its use is limited to the female unit, the mental health

unit, and the disciplinary unit.[48] The procedure requires the shift commander to contact the Warden or the Assistant Warden for authorization to use the restraint chair. Its use for longer than eight continuous hours without renewed approval by the Warden or Assistant Warden is prohibited. While in the restraint chair, the inmate's physical condition is checked every fifteen (15) minutes. The inmate is removed from the restraint chair every two hours, for a ten (10) minute period designed to provide an opportunity for movement of the inmate's limbs, exercise and toileting. A restraint record log must be maintained throughout the time that the inmate is in the restraint chair. The restraint log is reviewed by the Warden or Assistant Warden after the fact.

The evidence establishes that the Berks County policy for use of the restraint chair was followed in Mr. Fuentes' case. He was checked every fifteen minutes, he was permitted a ten minute break every two hours during which he was permitted to move, use the toilet, receive his medication and eat a meal. After eight hours, Mr. Fuentes was released and checked by a nurse. I will assume, for the purposes of summary judgment, that the restraint chair caused injuries to Mr. Fuentes in the form of cuts, loss of feeling in his limbs, restricted breathing and continuing, intermittent pain in his back.

While I recognize that placement in the restraint chair may be painful, I do not find that the use of the restraint chair pursuant to the Berks County Prison policy is violative of the Eighth Amendment under any of the tests currently being applied. Assuming *arguendo* that the restraint chair is used as a punishment[49], I do not view

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48. The policy and use of the restraint chair for mental health reasons are not at issue in this action.

49. The Eleventh Circuit has distinguished punishment from security measures as follows: "'Punishment' [is] a penalty administered after reflection and evaluation and is intended to deter similar conduct in the future, and 'immediately necessary coercive measures' [security] made without benefit of reflection and intended to bring an end to an ongoing

routine use of the restraint chair at Berks County Prison as a denial of the minimal civilized measure of life's necessities, nor is it objectively harmful enough to establish a constitutional violation. Further, I conclude that use of the restraint chair at Berks County Prison for punitive purposes is not incompatible with the '"concepts of dignity, civilized standards, humanity and decency"' that animate the Eighth Amendment. *Hudson*, 503 U.S. 1, 11 (1991)(*quoting Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Thus, I will grant summary judgment in favor of the Defendants on the Eighth Amendment claim (Count II).[50]

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violation." *Williams v. Burton*, 943 F.2nd 1572, 1576 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 3002 (1992).

As discussed above, there are genuine issues of material fact concerning whether the restraint chair is used for security or punitive reasons. Thus, I have allowed Plaintiff's procedural due process claims to go forward.

50. The United States Supreme Court has repeatedly cautioned reviewing courts to give deference to prison officials' actions in adopting and executing policies and practices that in their judgment is needed to preserve internal order and discipline and to maintain institutional security. *See Whitley v. Albers*, 475 U.S. 312, 320-22 (1986).

CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Summary Judgment is denied. Defendants' Motion for Summary Judgment is granted as to Count II, and denied in all remaining aspects. An appropriate Order is attached.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE LOUIS FUENTES	:	CIVIL ACTION
	:	
v.	:	
	:	
C/O KONEMANN, et al.	:	No. 96-3251

ORDER

AND NOW, this 28th day of May, 1998, upon consideration of the Cross-Motions for Summary Judgment (including the various memoranda in support, briefs in opposition and appendices of exhibits), it is hereby **ORDERED** that:

1. Plaintiff's Motion for Partial Summary Judgment [Docket Entry No. 44] is **DENIED.**

2. Defendants' Motion for Summary Judgment [Docket Entry No. 43] is **GRANTED IN PART, DENIED IN PART** as follows: Judgment is entered in favor of the Defendants on Count II. As to all remaining claims, Defendants' Motion for Summary Judgment is denied.

BY THE COURT:

_____

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE

(2)

No. 99-1970

Supreme Court, U.S.
FILED
JUL 10 2000
CLERK

IN THE

Supreme Court of the United States

LUIS FUENTES,

Petitioner,

v.

WAGNER, WARDEN; KONEMANN, CORRECTIONAL OFFICER; KLEEMAN, CORRECTIONAL OFFICER; DONATO, CORRECTIONAL OFFICER; BROWN, SERGEANT; WERST, ASSISTANT WARDEN; AND BERKS COUNTY, PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit was correct in ruling that where an unsentenced inmate alleges an excessive force claim arising from prison officials' conduct in response to a violent prison disturbance created by the inmate, the "shocks the conscience" test applies as the appropriate gauge of the officials' conduct.

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STATEMENT OF THE CASE

Relevant Factual Background

In December of 1995, Luis Fuentes was a federal inmate housed in the behavioral adjustment unit ("BAU") of the Berks County Prison. Pet. App. 3a. Fuentes had pled guilty to federal drug charges and was awaiting sentencing. *Id.* He was in the BAU for having previously tried to escape from the prison. Pet. App. 24a.

On December 28, 1995, the weather prevented the BAU inmates from their one hour outdoor exercise period. Pet. App. 3a. In place of outdoor exercise, the inmates were released individually from their cells to exercise in the hallway by their cell. *Id.* While another inmate was exercising, Fuentes yelled for a correctional officer. An officer came to Fuentes' cell and asked what the problem was. Fuentes said that it was nothing. A short while later, Fuentes began yelling again and, this time, kicked at his cell door. *Id.* At the time he kicked the cell door, Fuentes was aware that banging on cell doors was a violation of the rules of the BAU. Pet. App. 24a. Correctional Officers Konemann and Kleeman came to Fuentes' cell at which time Fuentes claimed that another inmate urinated onto the floor of his cell. Pet. App. 4a. The officers did not see urine on the floor of the cell, but Kleeman noticed wetness on the door and floor outside of Fuentes' cell. *Id.*

Pursuant to policy of the BAU, prior to entering an inmate's cell, the inmate must be handcuffed. *Id.* Konemann and Kleeman asked Fuentes to extend his hands so that he could be handcuffed. *Id.* He complied and the officers entered the cell. *Id.* The officers told Fuentes that they would be stripping his cell because he kicked the door. *Id.*[1]

Konemann began removing the sheets. Pet. App. 4a. Fuentes grabbed the sheets out of Konemann's hands and yelled, "this is bullshit. You're not going to strip my cell." Pet.

---

1 Cell stripping is a procedure which may be used when an inmate is causing a disturbance. It consists of removing from the cell all items except the clothes on the inmate's back, his legal papers and his toothbrush. For the first violation, the cell is stripped for 24 hours. For each subsequent infraction, an additional 24 hours is added. Pet. App. 24a.

App. 25a. Konemann attempted to retake the sheets from Fuentes. Fuentes swung at Konemann's head with his handcuffed fists. Pet. App. 4a. Konemann saw Fuentes swing and pushed him away. *Id.* Fuentes lunged at Konemann. Pet. App. 25a. As he did so, Kleeman grabbed Fuentes and wrestled him to the ground. *Id.* While on the ground, Fuentes attempted to free himself by kicking, struggling, and attempting to get to his feet. *Id.*

Correctional Officer Donato arrived shortly after Konemann and Kleeman began stripping the cell, but she left to get leg shackles and call for assistance. Pet. App. 4a. Donato returned with the leg shackles and several other officers. Pet. App. 5a. The officers placed the leg shackles on Fuentes, carried him to another cell, and, in accordance with prison policy, placed Fuentes in a restraint chair. Pet. App. 25a. It should be noted that Fuentes' claim of excessive force was for the initial confrontation in his cell only. Pet. App. 6a. Afterward, Plaintiff was examined by the prison nurse. Pet. App. 6a.

She observed no significant injuries. *Id.* She saw only minor edema on Fuentes' wrists and noted that Fuentes complained of pain in his right lower rib cage. *Id.*

Relevant Procedural History of the Action in the District Court

Fuentes brought an action in the Eastern District of Pennsylvania, alleging several claims including a Section 1983 of Title 42, U.S. Code claim for use of excessive force in violation of the Fourteenth Amendment's right to be free from the use of excessive force. Pet. App. 5a. Specifically, Fuentes claimed that on December 28, 1995, Correctional Officers Konemann and Kleeman beat him in his cell and that this application of physical force was excessive and unnecessary under the circumstances. Pet. App. 6a. Fuentes claimed that Correctional Officer Donato observed the use of excessive force against him and failed to intervene. The officers denied the claims.

The parties consented to proceed before a jury and Magistrate Judge M. Faith Angell. The parties submitted proposed jury instructions. Fuentes submitted the following instruction on the excessive force claim:

> 16. Right to Be Free from Use of Excessive and Unnecessary Force
>
> The first constitutional right at issue in this case is the Fourteenth Amendment right to be free from the use of excessive force. Mr. Fuentes alleges that defendants Konemann and Kleeman beat him in his cell on December 28, 1995, and that this application of physical force was excessive and unnecessary under the circumstances. Mr. Fuentes also alleges that defendant Donato observed the use of excessive force against him and failed to intervene.
>
> In order to prove that the defendants used excessive and unnecessary force, the plaintiff must prove by a preponderance of the evidence: (1) that the plaintiff suffered some harm, (2) that the harm resulted directly from the use of force that was clearly excessive in relation to any need for use of force, and (3) that the excessiveness of the force was objectively unreasonable in light of the facts and circumstances at the time.
>
> Some of the factors you may consider in determining whether the defendants used excessive force are: (1) the extent of the injury suffered, (2) the need for the use of force, (3) the relationship between that need and the amount of force used, (4) the threat reasonably perceived by the prison guards involved, and (5) any efforts made to temper the severity of the forceful response.
>
> *From Wilson v. Williams,* 83 F.3d 870, 873-74 (7th Cir. 1996); *see also Bell v. Wolfish,* 441 U.S. 520, 538-39, 561 (1979); *Telfair v. Gilberg,* 868 F. Supp. 1396, 1412-13 (S.D. Ga. 1994), *aff'd,* 87 F.3d 1330 (11th Cir. 1996); *Titran v. Ackman,* 893 F.2d 145, 147 (7th Cir. 1990).

Sup. App. 4b (citation in original).

The jury trial was held between November 3-6, 1998. On the excessive force claim, the court instructed the jury as follows:

> With regard to the excessive force claim, plaintiff alleges that Defendants Konemann and Kleeman beat him in his cell on December 28th, 1995 and that this application of physical force was excessive and unnecessary under the circumstances. Plaintiff seeks to hold Defendant Donato liable for observing this use of excessive force and for failing to intervene on his behalf. Under the Fourteenth Amendment of the Constitution, an individual who has not yet been sentenced, has the right to be free from excessive force. A prison official may only use the amount of force necessary under the circumstances.
>
> To succeed on his claim of excessive force, plaintiff must show by a preponderance of the evidence, that one or more of the defendants inflicted unnecessary and wanton pain and suffering. You must decide whether the force applied was in a good faith effort to maintain or restore discipline, in which case, you must find that the defendants did not use excessive force or whether the force applies [sic] was inspired by an unwise, excessive zeal, amounting to an abuse of official power, that shocks the conscience, in which case, you must find that one or more of the defendants did use excessive force.
>
> In considering the degree of force, a reasonable prison official would use under the circumstances of this case, you may consider such factors as: The need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, the extent of the threat to the safety of the staff and inmates as reasonably perceived by reason—responsive—officials and any efforts made to temper the severity of a forceful response.
>
> In order to prevail on his claim of use of excessive force, the plaintiff must prove that he suffered some

> physical or psychological injury. Certain *de minimis* uses of physical force provide that — certain *de minimis* uses of physical force provided that the use is not of the sort repugnant to the conscience of mankind, do not rise to the level of a constitutional infringement. However, the plaintiff need not establish a significant or serious physical or psychological injury in order to establish excessive force. He must prove by a preponderance of the evidence, that he sustained more than *de minimis* physical or psychological injuries resulting from the use of a [sic] excessive force by one or more of the defendants.
>
> With regard to the excessive force claim against Correctional Officer Donato, she is not alleged to have actually used force against the plaintiff. Plaintiff's excessive force claim against this defendant, rests on an alleged failure to intervene. In order to hold Correctional Officer Donato liable for excessive force, plaintiff must prove by a preponderance of the evidence that she was present in the D Unit, that she saw — D meaning Delta Unit — that she saw excessive force being applied against the plaintiff and that she did not attempt to stop it.

Sup. App. 1b-3b. Fuentes objected to the use of "shocks the conscience" in the instruction. Pet. App. 17a.

The jury found in favor of defendants. Pet. App. 3a.[2] Consistent with the jury's verdict, the Magistrate Judge entered judgment in favor of defendants and against Fuentes. Pet. App. 3a.

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2 The Magistrate Judge granted summary judgment in favor of the prison officials on Fuentes substantive due process claim for cruel and unusual punishment under the Eighth and Fourteenth Amendments. Fuentes remaining claims proceeded to trial and included claims for: excessive force under the Eighth and Fourteenth Amendments, procedural due process under the Fourteenth Amendment, and state law claims for assault and battery, and false imprisonment. Pet. App. 2a-3a.

Relevant Procedural History of the Action in the Third Circuit

Fuentes appealed to the United States Court of Appeals for the Third Circuit, arguing several issues including a claim that the trial court erred when instructing the jury on the excessive force claim. Fuentes claimed that his "objective reasonableness" instruction should have been given to the jury. In a well reasoned opinion, the Third Circuit upheld the verdict and concluded that the jury instruction on excessive force was proper.

In deciding the issue, the Third Circuit first looked to *Graham v. Connor,* 490 U.S. 386 (1989) wherein the Court stated that the "objective reasonableness" test has its foundation in the Fourth Amendment and is applied properly in excessive force claims arising from investigatory stops and/or arrests. Pet. App. 18. The Third Circuit determined that Fuentes was not entitled to an "objective reasonableness" instruction. Pet. App. 18. In Petitioner's Brief, he states incorrectly that the Third Circuit "concluded that a Fourth Amendment standard was appropriate only in claims arising from investigatory stops and/or arrests." Pet. 5.[3]

Secondly, the Third Circuit addressed the *Bell v. Wolfish,* 441 U.S. 520 (1979) standards for "conditions of confinement" cases, but agreed, instead, with the analysis of *Valencia v. Wiggins,* 981 F.2d 1440 (5th Cir. 1993), *cert. denied,* 113 S.Ct. 2998, that *Bell* "while working 'well for claims of improper conditions or restrictions,... does not lend itself to analysis of claims of excessive force in controlling prison disturbances.' " Pet. App. 19a (alteration in original). The court in *Valencia* was confronted with the issue of a pretrial detainee's excessive force claim against a prison guard in the context of a prison

3 In *United States v. Lanier,* 520 U.S. 259 (1997), the Court explained that *Graham* does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

disturbance. *See Valencia,* 981 F.2d 1440. Pursuant to *Bell,* the Third and Fifth Circuit courts, here, noted that there is no basis to conclude that pretrial detainees pose any lesser security risk than convicted inmates and, accordingly, there is no reason to distinguish between the two when reviewing challenged security practices. Pet. App. 19a.

To determine the standard to apply to gauge the conduct of the prison officials, the Third Circuit again agreed with the analysis of the court in *Valencia. Id.* In *Valencia,* the court stated that:

> we are guided by the standard announced in *Whitley* and *Hudson.* While these cases specifically addressed claims of excessive use of force brought by convicted prisoners, it is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security. Moreover, the Court indicated in *Hudson* that many of its concerns in *Whitley* were not limited to Eighth Amendment claims but "arise whenever guards use force to keep order." It further observed that claims based on excessive force and claims based on conditions of confinement are different in kind.

Pet. App. 19a (citing *Valencia,* 981 F.2d at 1446). The Third Circuit held that the Eighth Amendment cruel and unusual standards found in *Whitley v. Albers,* 475 U.S. 312 (1986) and *Hudson v. McMillian,* 503 U.S. 1 (1992) apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance. Pet. App. 20a.

Finally, the Third Circuit looked to the 1998 Supreme Court case, *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) to address Petitioner's claim that it was error to instruct the jury on the shocks the conscience test. *Id.*[4] In *Lewis,* the Court concluded that the "shocks the conscience" standard applies to police pursuit cases and analogized the police offic-

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4 The court in *Valencia* rejected the shocks the conscience test. However, as the court in *Telfair v. Gilberg,* 868 F. Supp. 1396 (S.D. Ga. 1994), *aff'd,* 87 F.3d 1330, correctly observed, *Valencia* derived its excessive force test from *Whitley* and *Hudson* which derived their standards from *Johnson*

ers' situation in a pursuit case to that of prison officials who have to respond immediately to a violent prison disturbance to restore and maintain order and security. Pet. App. 21a. The Third Circuit cited *Hudson, supra,* wherein the Court noted that officials confronted with a prison disturbance, whether the disturbance is a riot or a lesser disruption, "must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force . . . [and] should be accorded wide-ranging deference . . . that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Pet. App. 21a.

The Third Circuit observed that at the time of the incident in Fuentes' cell, Fuentes' behavior was violent and disruptive at his own initiative. Pet. App. 22a. His behavior, if left unchecked, could have aroused other inmates to violence who, in turn, could hurt others or themselves. Fuentes' behavior of swinging at Konemann's head with handcuffed fists, if left unchecked, could have resulted in serious injury to Konemann and the other officials. Kleeman, Konemann, and Donato had to respond quickly to stop the disturbance, minimize the disturbance that Fuentes was causing, and to protect themselves and the security of the correctional facility. The Third Circuit determined that the "shocks the conscience" test to gauge the official conduct, the same test that the Supreme Court has used in analogous cases, including high speed chases, was appropriate here. Pet. App. 22a.

NOTES *(Continued)*

v. Glick. Id. at 1411 n.5. The court in *Johnson* used the shocks the conscience test. *Johnson,* 481 F.2d 1028 (2d Cir. 1973), *cert. denied,* 414 U.S. 1033.

REASONS FOR DENYING THE WRIT

Fuentes, an unsentenced inmate, caused a prison disturbance, necessitating official conduct to act quickly to protect themselves and the security of the correctional institute. As an alleged result of the encounter, Fuentes sustained minor edema and bruising of his wrists and he had complaints of pain to his right, lower, rib cage. Fuentes contends that the Court has not provided guidance to lower courts to determine the appropriate standard to apply when an unsentenced inmate alleges excessive use of force by a correctional officer. Also, he contends that federal courts across the country inconsistently decide the issue. Petitioner paints a dire picture for pretrial detainees and one unwarranted in light of the liberty interest at issue and the history, traditions and practices surrounding due process.

I. The Supreme Court Provides Guidance on Excessive Force Claims

It is well settled that the core of due process is protection against arbitrary action. *County of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998); *see Wolff v. McDonnell,* 418 U.S. 539, 558 (1974) (stating that the touchstone of due process is protection of the individual against arbitrary action). Criteria to identify what is fatally arbitrary differs depending upon whether a legislative or specific act of a government official is at issue. *Lewis,* 523 U.S. at 845. The Court in *Lewis* cites *Collins v. Harker Heights,* 503 U.S. 115, 129 (1992) and *Daniels v. Williams,* 474 U.S. 327, 332 (1986) to stress that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,' " and "that it is a *constitution* that we are expounding," respectively. *Id.*

That being said, the Court in *Lewis* noted that for half of a century, the cognizable level of executive abuse of power is that which shocks the conscience. *Id.* (citing *Rochin v. California,* 342 U.S. 165 (1952)). The Court cautioned that the concept of that conduct which shocks the conscious is fluid:

> Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate

> indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.

Lewis, 523 U.S. at 849. For example, conduct that shows deliberate indifference in the custodial situation of a prison, such as failing to provide for basic human needs, where forethought is feasible and obligatory, can rise to a constitutionally shocking level. *Id.* However, a much higher standard of fault than deliberate indifference has to be shown for officer liability in prison riots and high speed chases. *Id.* The rationale is that officials in these circumstances must make decisions "in haste, under pressure and without the luxury of a second chance." *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). The Court in *Lewis* explained that in those circumstances "liability should turn on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.' " *Id.* The Court held that intent to harm was needed for constitutional liability in police pursuit cases and stated that the fault claimed by the plaintiff, "conscious disregard," failed to meet the shocks the conscience test. *Lewis*, 523 U.S. at 850. The Court stated that the analogy to prison riot cases would be hard to avoid. *Id.* at 849.

After reading *Lewis* and the cases cited therein, there can be no doubt that the Court has provided guidance on the standards of conduct that violate substantive due process in excessive force cases.

II. The Federal Courts of Appeal are Not in Conflict

An analysis of the decisions of the Federal Courts of Appeal to which Petitioner cites reveals that, with few exception, the courts are not in conflict. Different factual circumstances properly warrant courts to reach different standards to address excessive force claims. Moreover, every case cited by Petitioner in support of the contention that the courts are in conflict predates *Lewis*.

A. The "Objective Reasonableness" Standard

Petitioner contends that the Eighth, Seventh and Ninth Circuits judge a pretrial detainee's excessive force claim by whether the correctional officers' conduct was "objectively reasonable." First, Petitioner cites to Eighth Circuit cases, *Freeman v. Johnson,* 107 F.3d 875, 1997 WL 61226 (8th Cir. 1997) and *Smith v. Copeland,* 892 F. Supp. 1218 (E.D. Mo. 1995), *aff'd,* 87 F.3d 265 (8th Cir. 1996). These cases provide little support to the argument.

Freeman, an unpublished opinion, involves a claim for excessive force brought by a pretrial detainee. *Freeman,* 107 F.3d 875. The claim does not arise in the context of a prison disturbance. *Id.* The court in *Freeman* provides little analysis on the issue of the excessive force claim, but simply determines that the plaintiff's due process rights were not violated. *Id.* Interestingly, the court cites to *Burton v. Livingston,* 791 F.2d 97 (8th Cir. 1986) to show that the due process inquiry includes a determination of whether officers acted in good faith or maliciously and sadistically, and whether force used exceeded the force needed. *Freeman,* 107 F.3d 875. *Burton* involved an inmate's excessive force claim. *Burton,* 791 F.2d 97. In *Burton,* the Eighth Circuit discusses *Daniels v. Williams* and *Rochin v. California, supra,* and emphasizes that in reviewing due process claims, courts must "survey-... anew ... each case through an examination of the benchmarks disclosed by the circumstances surrounding the case." *Id.* at 100. Accordingly, the Eighth Circuit does not adopt an objective standard in all pretrial detainee cases.

The district court in *Smith v. Copeland, supra,* appeared to apply an objective standard. *Smith,* 892 F. Supp. at 1229. The court did not mention the shocks the conscience test. It should be noted that the issues on appeal in *Smith* did not include issues concerning the claim for excessive force.

Petitioner's claim regarding the Seventh Circuit also lacks merit. Petitioner cites *Titran v. Ackman,* 893 F.2d 145 (7th Cir. 1990) and *Wilson v. Williams,* 83 F.3d 870 (7th Cir. 1996). In *Titran,* the court rejected the shocks the conscience standard. However, the case did not involve a prison disturbance and it was decided before *Lewis.*

In *Wilson,* though, the Seventh Circuit clearly distinguishes between excessive force claims arising in the context of a prison disturbance and those not. *Wilson,* 83 F.3d at 876-77. The court stated:

> Considering the fact that convicted prisoners and pretrial detainees are held together in correctional facilities, we recognize the impracticality of separate standards for these two groups in the context of a jail disturbance. Indeed, the Supreme Court has stated that there is no reason to distinguish between the two groups in reviewing challenged security practices because there is no basis to conclude that pretrial detainees pose any lesser security risk than convicted inmates. *Bell,* 441 U.S. at 546 n. 28. We may therefore assume, without deciding, that in the prison security context, the applicable standard for excessive force claims is provided by the Eighth Amendment, as explained in *Whitley* and *Hudson*: whether the measure taken inflicted unnecessary and wanton pain and suffering depends on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson, 503 U.S. at 7* (citing *Whitley,* 475 U.S. at 320-21).

Id.

Petitioner's contentions that the Ninth Circuit adopts an objective reasonableness standard in all pretrial detainee situations is equally inapposite with the case law Petitioner cites. For instance, Petitioner cites to *White v. Roper,* 901 E.2d 1501 (9th Cir. 1990), a case involving a pretrial detainee claiming excessive use of force arising from officers' attempts to subdue the detainee. In addressing the standard for excessive force, the court cites to other Ninth Circuit cases wherein the shocks the conscience standard was applicable. *Id.* at 1507. Finally, Petitioner cited *Pierce v. Multnomah County,* 76 F.3d 1032 (9th Cir. 1996) which involved an excessive force claim of an arrestee detained without a warrant. The court recognized that to decide the appropriate standard, it "must determine

what constitutional protection governs this particular juncture of the custodial continuum." *Id.* at 1042-43. The court did not hold that an objective reasonableness standard was applicable to all pretrial detainee situations. *Id.*

B. The "Shocks the Conscience" Standard

As indicated in the above discussions regarding in the Third Circuit's opinion, the Court's opinion in *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) and the case law identified in those cases, the shocks the conscience test is appropriately applied to a pretrial detainee's excessive force claim arising in the context of a prison disturbance. The discussions and reasoning will not be repeated herein. However, some of Petitioner's contentions about the statement of the law must be addressed.

First, in footnote 4 of Petitioner's Brief, Petitioner contends that Justices Scalia and Thomas, in their concurring opinion in *Lewis,* "took issue with the shocks the conscience test." Pet. 13. It is respectfully submitted that the focus of Justices Scalia and Thomas' concurring opinion is not with the shocks the conscience test, but rather that the majority in *Lewis,* an executive action case, did not first carefully describe the right to be protected and address whether the right asserted is traditionally protected. *Lewis,* 523 U.S. at 861-62. Similarly, Petitioner cites to *Washington v. Glucksberg,* 521 U.S. 702 (1997) to support the contention that the Court "took issue" with the shocks the conscience test. Pet. 13. The emphasis of the Court in *Glucksberg* was that courts must first reach the question of whether there is a protected liberty interest. *Glucksberg,* 521 U.S. 702. In *Glucksberg,* the Court determined that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process clause." *Id.* at 718.

Secondly, Petitioner concedes that the Fourth Circuit in *United States v. Cobb,* 905 F.2d 784 (4th Cir. 1990) adopted the *Johnson v. Glick,* 481 F.2d 1028 (2d Cir. 1973) shocks the conscience test wherein the *Cobb* court applied the test to a pretrial detainee excessive force claim. Pet. 14. However, Petitioner inexplicably calls into question the "continuing vitality

in the Fourth Circuit." Petitioner cites *Taylor v. McDuffie*, 155 F.3d 479 (4th Cir. 1998) and *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997). In *Taylor*, a case involving a pretrial detainee excessive force claim, the court cited to *Norman v. Taylor*, 25 F.3d 1259 (4th Cir. 1994) which had the fact finder consider whether any force used was "repugnant to the conscience of mankind." *Taylor, 155* F.3d at 484 (citing *Norman*, 25 E.3d at 1263). In footnote 7 of *Taylor*, the court expressly stated that the holdings of *Norman* and *Riley* have not been "called into question, much less overruled, by an intervening decision of the Supreme Court. As a consequence, *Norman* and *Riley* continue to be the binding law of this Circuit." *Id.* In *Riley*, a case involving an excessive force claim of a pretrial detainee, the court applied the shocks the conscience test to the plaintiff's claim. *Riley*, 115 F.3d at 1168 n.4.

C. The "Malicious and Sadistic" Standard

Petitioner argues that the malicious and sadistic standard exists separate and apart from the shocks the conscience test. Pet. 15. To the contrary, the malicious and sadistic standard coexists with the shocks the conscience test. The jury may properly be charged with both standards. *See Lewis*, 523 U.S. at 851 (evaluating whether there was malicious motive and conscience shocking behavior); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (applying the shocks the conscience test and identifying factors to consider in determining whether the "constitutional line has been crossed," one of which is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm").

Petitioner also contends that the Second and Fifth Circuits "explicitly rejected the 'shocks the conscience' test" and cites, *inter alia*, *United States v. Walsh*, 194 F.3d 37 (2d Cir. 1999). Pet. 15. The Second Circuit does not reject the shocks the conscience test, but rather uses it. *Walsh*, 194 F.3d 37. The *Walsh* court, in addressing the defendant's claim of error that the jury was not charged on the shocks the conscience test but "was instructed exclusively on the "unnecessary and wanton infliction of pain" standard associated with Eighth Amend-

ment claims," stated:

> While the failure to articulate the correct standard for claims brought by pretrial detainees was technically error . . . [defendant] cannot demonstrate any prejudice resulting from the error.
>
> The factors used to evaluate the "shocks the conscience" and the "unnecessary and wanton" standards in the context of excessive force claims in the prison context are identical—specifically, the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether the force was applied in a good-faith effort to restore discipline or sadistically for the purpose of causing harm . . . Therefore, while the terms used to articulate the standard are different, in substance they are the same with respect to excessive force claims in the prison context, and the jury could not have been misled or confused by the failure to articulate the proper terminology.

Id. at 45-46.

Lastly, Petitioner cites to *Rodriguez v. Phillips,* 66 F.3d 470 (2d Cir. 1995), decided before *Walsh* and *Lewis. Rodriguez* does not involve the claim of excessive use of force by a pretrial detainee arising in the context of a prison disturbance. *Id.* Further, the Court in *Lewis* cited *Johnson v. Glick,* 481 F.2d 1028 (2d Cir. 1973), the case that the court in *Rodriguez* apparently questioned, stating that "[w]hile the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'point the way.' " *Lewis,* 523 U.S. at 846 (citing Judge Friendly's opinion in *Johnson,* 481 F.2d 1028).

In summary, the Federal Courts of Appeal are not in conflict as Petitioner has contended.

III. The Third Circuit Correctly Applied the Shocks the Conscience Test

Petitioner concludes that the Third Circuit erroneously adopted the shocks the conscience test as the appropriate con-

stitutional standard for pretrial detainee claims. As discussed above and below, the argument fails.

To reiterate previous discussions, when officials are confronted with a prison disturbance, the official must balance the threat that unrest poses to inmates, prison workers, administrators and visitors against the harm inmates may suffer if guards use force. *Hudson v. McMillian,* 503 U.S. 1, 6 (1992). The Court stated:

> Despite the weight of these competing concerns, corrections officials must make their decisions 'in haste, under pressure, and frequently without the luxury of a second chance. We accordingly concluded in *Whitley* that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.

Id. (citations omitted) (edits omitted). Under the circumstances of a pretrial detainee's excessive force claim arising in the context of a prison disturbance, a shocks the conscience standard is appropriate.

In support thereof, the Court in *City of Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239, 244 (1983), provides that the Due Process Clause provides pretrial detainees with "at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.* Petitioner misstated the Court in *Revere* when he stated that pretrial detainees have "more protection." Pet. 17.

Petitioner continues to stress that the focus of an excessive force claim for a pretrial detainee must be whether the detainee suffered punishment at all. As indicated above, the case law, the historical context and practices surrounding the due process clause on this issue refute the argument. The court's charge on excessive force was proper and did not create error.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GERMAN, GALLAGHER & MURTAGH

BY: _____

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Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE LUIS FUENTES	:	CIVIL ACTION
Plaintiff	:	No. 96-CV-3251
vs.	:	
BERKS COUNTY PRISON GUARDS	:	Philadelphia, Pennsylvania
Defendant	:	Friday, November 6, 1998
	:	JURY TRIAL – DAY IV

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE M. FAITH ANGELL
UNITED STATES MAGISTRATE COURT JUDGE

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ESR OPERATOR: Karen T. Davidson

TRANSCRIBED BY: Drummond Transcription Service
Haddon Heights, New Jersey 08035

Proceedings recorded by electronic sound recording, transcript produced by computer-aided transcription service.

* * *

[4-100]

Charge of the Court

Correctional Officers Konemann, Kleeman and Donato, Sergeant Brown and Assistant Warden Werst, plaintiff asserts that the defendants violated his constitutional right now to be deprived his liberty without due process of law.

Let's go through each of these two civil rights claims one at a time, so I can tell you the specific elements which plaintiff is required to prove in order to establish that his constitutional rights were violated.

With regard to the excessive force claim, plaintiff alleges that Defendants Konemann and Kleeman beat him in his cell on December 28th, 1995 and that this application of physical force was excessive and unnecessary under the circumstances. Plaintiff seeks to hold Defendant Donato liable for observing this use of excessive force and for failing to intervene on his behalf.

Under the Fourteenth Amendment to the Constitution, an individual who has not yet been sentenced, has the right to be free from excessive force. A prison official may only use the amount of force necessary under the circumstances.

To succeed on his claim of excessive force, plaintiff must show by a preponderance of the evidence, that one or more of the defendants inflicted unnecessary and wanton pain and suffering. You must decide whether the force applied was in a good faith effort to maintain or restore discipline, in which case, you must find that the defendants did not use excessive

[4-101]

force or whether the force applies was inspired by an unwise, excessive zeal, amounting to an abuse of official power, that shocks the conscience, in which case, you must find that one or more of the defendants did use excessive force.

In considering the degree of force, a reasonable prison official would use under the circumstances of this case, you may consider such factors as: The need for the application of

force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, the extent of the the threat to the safety of the staff and inmates as reasonably perceived by reason — responsive — officials and any efforts made to temper the severity of a forceful response.

In order to prevail on his claim of use of excessive force, the plaintiff must prove that he suffered some physical or psychological injury. Certain *de minimis* uses of physical force provided that — certain *de minimis* uses of physical force provided that the use is not of the sort repugnant to the conscience of mankind, do not rise to the level of a constitutional infringement. However, the plaintiff need not establish a significant or serious physical or psychological injury in order to establish excessive force. He must prove by a preponderance of the evidence, that he sustained more than *de minimis* physical or psychological injuries resulting from the use of a excessive force by one or more of the defendants.

With regard to the excessive force claim against

[4-102]

Correctional Officer Donato, she is not alleged to have actually used force against the plaintiff. Plaintiff's excessive force claim against this defendant, rests on an alleged failure to intervene. In order to hold Correctional Officer Donato liable for excessive force, plaintiff must prove by a preponderance of the evidence that she was present in the D Unit, that she saw — D meaning Delta Unit — that she saw excessive force being applied against the plaintiff and that she did not attempt to stop it.

In his second civil rights claim, the plaintiff contents that Correctional Officer Konemann, Kleeman and Donato, Sergeant Brown and/or Assistant Warden Werst deprived him of his liberty without due process of law, when they caused the plaintiff to be confined in a restraint chair on December 28th, 1995, without first giving him a hearing.

Conversely, the defendants argue that the use of the restraint chair under the circumstances of this case, was related to a legitimate, non-punitive government interest of

controlling unruly inmates in the disciplinary unit and to modify their behavior where all other forms of discipline had been exhausted.

Under the due process clause of the Fourteenth Amendment, a person awaiting sentencing — as the plaintiff was on December 28th, 1995 — may not be punished. In this case, the parties have stipulated to the fact that the plaintiff was

* * *

* * *

16. Right to Be Free from Use of Excessive and Unnecessary Force

The first constitutional right at issue in this case is the Fourteenth Amendment right to be free from the use of excessive force. Mr. Fuentes alleges that defendants Konemann and Kleeman beat him in his cell on December 28, 1995, and that this application of physical force was excessive and unnecessary under the circumstances. Mr. Fuentes also alleges that defendant Donato observed the use of excessive force against him and failed to intervene.

In order to prove that the defendants used excessive and unnecessary force, the plaintiff must prove by a preponderance of the evidence: (1) that the plaintiff suffered some harm, (2) that the harm resulted directly from the use of force that was clearly excessive in relation to any need for the use of force, and (3) that the excessiveness of the force was objectively unreasonable in light of the facts and circumstances at the time.

Some of the factors you may consider in determining whether the defendants used excessive force are: (1) the extent of the injury suffered, (2) the need for the use of force, (3) the relationship between that need and the amount of force used, (4) the threat reasonably perceived by the prison guards involved, and (5) any efforts made to temper the severity of the forceful response.

From *Wilson v. Williams*, 83 F.3d 870, 873-74 (7th Cir. 1996); *see also Bell v. Wolfish*, 441 U.S. 520, 538-39, 561 (1979); *Telfair v. Gilberg*, 868 F. Supp. 1396, 1412-13 (S.D. Ga. 1994), *aff'd* 87 F.3d 1330 (11th Cir. 1996); *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990).

* * *

Supreme Court, U.S.
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No. 99-1970

IN THE SUPREME COURT OF THE UNITED STATES

LUIS FUENTES, PETITIONER

v.

WAGNER, WARDEN; KONEMANN, CORRECTIONAL OFFICER; KLEEMAN, CORRECTIONAL OFFICER; DONATO, CORRECTIONAL OFFICER; BROWN, SERGEANT; WERST, ASSISTANT WARDEN; AND BERKS COUNTY, PENNSYLVANIA, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The issue in this case is whether a 42 U.S.C. § 1983 action brought by a pretrial detainee who alleges the use of excessive force by prison officials in violation of the detainee's Fourteenth Amendment substantive due process right to be free from punishment should be governed by the "objective reasonableness" standard applied to Fourth Amendment questions, or the "shocks the conscience" standard that has recently been applied in police pursuit cases. As the Petition for a Writ of Certiorari demonstrated, there are fundamental conflicts regarding this issue among the federal circuit courts of appeal and, indeed, even among trial courts within particular circuits. *See* Pet. at 7-16. This Court should grant certiorari to resolve these conflicts by providing a uniform standard that protects pretrial detainees against the unconstitutional imposition of punishment.

In opposing the Petition, Respondents suggest that *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), resolves the question this case presents to the Court. They are wrong. *Lewis* arose from a high-speed police pursuit that accidentally resulted in the death of a motorcycle passenger. The question before the Court in *Lewis* was "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Lewis*, 523 U.S. at 836.

The factual and legal issues in this case are entirely different. This case arises from correctional officers' intentional application of force against a detainee confined to prison by the state. *Lewis* did not even purport to address these circumstances. To the contrary, the *Lewis* Court expressly distinguished "the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases." *Id.* at 851. And even in the context of a violent prison disturbance, the Court noted carefully that its prior decisions had been restricted to the Eighth Amendment. *See Lewis*, 523 U.S. at 852 ("albeit under the Eighth Amendment"). These careful distinctions are consistent with the Court's prior two decisions reserving the issue of the proper test to apply to pretrial detainee excessive force claims. *See Whitley v. Albers*, 475 U.S. 312, 327 (1986) (noting that the Court's holding regarding inmate excessive force claims "impl[ies] nothing as to the proper answer" to the question of pretrial detainees' rights under the Due Process Clause); *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)

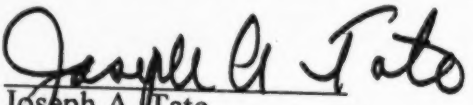
(declining to define the parameters of detainees' protection against the deliberate use of excessive force). Thus, this case presents the Court with an opportunity to resolve the very question it has set aside at least three times previously.

Finally, while Respondents have acknowledged (as they must) the existence of conflicting legal tests prior to the *Lewis* decision in May 1998, they argue that the lower courts' confusion predates *Lewis*. Resp. at 10-15. Again, they are wrong. Since *Lewis* came down, the lower courts have continued to issue opinions applying vastly different tests to pretrial detainee excessive force claims. For example, the Seventh Circuit recently held that the appropriate test for pretrial detainee excessive force claims is "'whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them.'" *King v. Price*, 2000 WL 831802 at *2 (7th Cir. June 26, 2000). Likewise, the Ninth Circuit has endorsed a four-part test that turns on reasonableness. *See Hoskins v. Plummer*, 1999 WL 637801 at *1 (9th Cir. 1999). Even trial judges sitting in the very same district have applied completely different legal standards to pretrial detainee claims. *Compare Uerling v. Piccinini*, 1999 WL 225981 at *2 (N.D. Cal. April 12, 1999) (holding that a pretrial detainee's due process claims turned on "the reasonableness of the officers' actions in light of the circumstances") *with Moore v. Martinez County Jail*, 1998 WL 602113 at *2 (N.D. Cal. Sept. 4, 1998) (applying the Eighth Amendment standard). Another federal court has rejected the Due Process Clause entirely and held that pretrial detainee claims are governed directly by the Eighth Amendment. *See Thomas v. Sawyer*, 1999 WL 155704 at *2 (N.D. Tex. Mar. 11, 1999). Significantly, not one of these cases adopts the shocks-the-conscience test approved by the Third Circuit, and none cites to *Lewis* either.

CONCLUSION

If anything, the Respondents' Brief in Opposition to Petition for a Writ of Certiorari underscores the need for this Court to resolve the marked conflict among the federal courts and to protect pretrial detainees from the use of excessive force that amounts to punishment. Accordingly, Petitioner respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully Submitted.



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